# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1963**

## No. 245

MILTON BERMAN, PETITIONER,

*vs.*

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**PETITION FOR CERTIORARI FILED JUNE 28, 1963**
**CERTIORARI GRANTED OCTOBER 21, 1963**

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF NEW YORK**

62 Cr. 1112

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UNITED STATES OF AMERICA,

vs.

MILTON BERMAN, Defendant.

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**Transcript of Hearings—March 8, 11, 13, and 14, 1963**

Before: Hon. Thomas F. Croake, District Judge, and a jury.

APPEARANCES:

Robert M. Morgenthau, Esq., United States Attorney, for the government; By: Charles Fanning, Esq., Assistant United States Attorney.

Irwin L. Germaise, Esq., Attorney for defendant.

* * * * * * *

[fol. 9] March 8, 1963

RENEWAL OF MOTION

Mr. Germaise: Your Honor, may I at this time renew that motion that is before your Honor and upon which you reserved decision so that there is no question of my [fol. 10] waiving my rights to make that motion?

The Court: All right. You may consider the motion renewed on the papers previously filed—

Mr. Germaise: Thank you, your Honor.

The Court:—at this time, and decision is reserved.

* * * * * * *

[fol. 21] PAUL A. SCANLON, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fanning:

* * * * * * *

[fol. 23] Q. Mr. Scanlon, do you know the defendant Milton Berman?

A. Yes, sir, I do.

Q. Would you tell the Court and jury when it was you first met him?

A. I first met Mr. Berman on November 2, 1962. It was in the salesroom of Morgan Motors, 210 West 54th Street, New York City.

Q. At that time were you alone or were you with somebody else?

A. At that time I was in company with Agent Harris Martin, U. S. Secret Service.

[fol. 24] Q. Did you have a conversation with this defendant at that time?

A. Yes, sir, I did.

Q. Would you tell us what that conversation was?

A. Yes, sir. Mr. Martin and I entered the showroom of Morgan Motors and we approached the desk, which was located on the side, about midcenter, and asked for Milton Berman.

Mr. Berman identified himself as being Milton Berman, and we in turn identified ourselves as government agents. We then asked to talk to him alone, there being two other people at his desk.

We stopped away about 10 feet from his desk and at that time Mr. Berman suggested that we talk outside in a car which was parked on the street directly in front of the salesroom.

Mr. Martin and I and Mr. Berman then proceeded to the car and all three of us got into it.

In the car I told Mr. Berman my name and also Mr. Martin's name. At the same time I told him that we had some information to the effect that he was involved in

counterfeiting, specifically with one John Ruoto. I told [fol. 25] Mr. Berman that we intended to ask him some questions.

The Court: John who?
The Witness: Ruoto, R-u-o-t-o.

A. I told Mr. Berman we intended to ask him some questions and that he did not have to answer these; that if he chose to answer them, anything he said might be used against him.

I then asked him if he knew anything about counterfeiting. He said he did not. I asked him if he had ever been involved in counterfeiting in any way. He said that he hadn't been. I asked him if he ever had bought counterfeit money from John Ruoto. He said that he had not. I asked him if he knew John Ruoto. He said that he had known Ruoto for several years, having met him through a used-car agency that Ruoto at one time operated in New Jersey.

I again asked him if he had ever been involved in any way with counterfeiting either alone or with John Ruoto, and he said that he never had and he couldn't understand where our information came from.

I then asked him what use he had of the premises at Morgan Motors, 210 West 54th. He told us that he only [fol. 26] leased desk space and that was the only thing that he had in the sales room. I asked him if he had access to a storeroom, a locker, a tool room or anything of that nature, and he said that he hadn't.

I then asked Mr. Berman for permission to search his desk, and he gave his permission.

Mr. Martin, Mr. Berman and I then reentered the showroom and went to his desk. Mr. Martin and I started to search the desk in Mr. Berman's presence. I had searched about one or two drawers when a man who later was identified as Lou Okun, the owner of Morgan Motors, came over and spoke to me. After a brief conversation with him we went to an office at the rear of the salesroom. I had another conversation with Mr. Okun and as a result of that conversation we went to a storeroom which was located right next to his office.

In the storeroom Mr. Okun—it was dark, and he put the light on, and I noticed on a shelf that there were between

six and ten cardboard cartons, mainly one piled on top of the other in groups of two.

At about this time I was joined by Mr. Martin and Mr. Berman, and I then took down two of the cartons, one atop [fol. 27] the other. In the top carton—I searched the carton and found numerous—it was filled with papers and all of them—a majority of them were addressed to Mr. Berman.

Prior to taking down the cartons I had asked him if any of the cartons were his. When I found that a majority of the written papers in the carton were addressed to him, I asked him what the story was. He said that he had placed both cartons in the storeroom about two weeks ago without Mr. Okun's permission or knowledge.

There was nothing in the top carton, and I then proceeded to search the second carton or the underneath one.

Q. Just to interrupt you, when you say "nothing in the top carton," what do you mean by that?

A. Nothing of interest to us, let's put it that way.

I then started to search the bottom carton and I found a white, normal-type mailing envelope.

Q. May I interrupt one moment, please?

Mr. Fanning: Would you mark this as Government's Exhibit 7 for identification.

(Government's Exhibit 7 marked for identification.)

[fol. 28] (Government's Exhibit 8 marked for identification.)

By Mr. Fanning:

Q. While this is being marked, would you proceed? Did you find anything else?

A. When I opened this envelope, which was not sealed, I found it contained six United States bonds and one stock certificate representing 100 shares of Bon Ami Corporation.

I looked at the bonds and saw that they were from Bridgeport, Connecticut, addresses, five of them addressed to a Mr. Samowitz and one addressed to a Mr. Robillard.

Q. I show you what has been marked as Government's Exhibits 1 through 6 in evidence and ask you if these are the bonds you referred to.

A. Yes, sir, these are the bonds to which I make reference.

Q. And I show you what has been marked as Government's Exhibit 8 for identification and I ask you if that is the certificate of Bon Ami stock that you referred to.

A. Yes, sir, it is.

[fol. 29] Q. Now I show you what has been marked as Government's Exhibit 7 for identification and ask you if that is the envelope that you referred to.

The Court: What is the number of the stock certificate?

Mr. Fanning: The stock certificate is Government's Exhibit 8 for identification, your Honor.

A. I don't believe this is my envelope. I believe there should be another one in which the bonds and stock were contained.

Q. Yes, here we are. We won't put these in evidence, but can you identify Government's Exhibit 7 for identification?

A. Yes, sir, I can.

Q. What is that?

A. Well, this is an envelope that was also in the same carton to which I am making reference, which was taken from the carton by Agent Martin; and when he opened it and extracted the contents, which was another envelope, in the second envelope were 110 counterfeit $20 notes.

Mr. Fanning: Let the record reflect that I am opening the envelopes and extracting therefrom the contents.

[fol. 30] By Mr. Fanning:

Q. And is this the contents that you referred to as 110 $20 counterfeit notes, and are those the tissues that they were wrapped in (handing)?

A. Yes, sir, these are the counterfeit notes. They were wrapped in napkins when they were taken from the envelope by Mr. Martin.

Q. Is there anything on these bills that was placed on there by you or others in your presence, any initials?

A. They contain my initials, which are PAS, and the date 11/2/62. They also contain Mr. Martin's initials, HM,

and the date 11/2/62. And four of the notes contain the initials MB, 11/2/62, and these are the initials of Mr. Berman and which were put on by him in my presence.

OFFERS IN EVIDENCE

Mr. Fanning: At this time, your Honor, the government offers in evidence Government's Exhibit 7 for identification and its contents, the counterfeit bills.

Mr. Germaise: No objection, your Honor.

The Court: Received.

(Government's Exhibit 7 for identification received in evidence.)

[fol. 31] By Mr. Fanning:

Q. Have you examined these bills, Agent Scanlon?

A. Yes, sir, I have.

Q. And can you testify as an expert as to their genuineness?

A. They are all counterfeit.

Q. What is the serial number of the—I am sorry. Do they all have the same serial number?

A. Yes, sir.

Q. Do any two genuine bills have the same serial number?

A. No, sir.

Q. Would you continue? Did you question Mr. Berman concerning these bills when you found them?

A. Prior to Mr. Martin finding the envelope which contained the bills, I asked Mr. Berman, "What is the story in relation to the saving bonds and the Bon Ami certificate?" and he told me that he knew nothing about them.

Mr. Martin then found the envelope containing the counterfeit notes, and in the same envelope was a blank book of American Express money orders—I think there were 10 in number or 20 in number—that were in the maximum value [fol. 32] of $50 each; also, in the same envelope was an American Express money order agency validating stamp.

I asked Mr. Berman, "What about the counterfeit money?" and after initially denying knowing anything about it, he then told us that it was his; that he had placed it in

the box about a month ago, and that he had bought the money from John Ruotó; that he had paid 10 per cent of the face value of them.

We asked him, or I asked him if he had passed any of the notes, and he said that he had not.

We then asked him, "What about the American Express money orders and the validating stamp?" He said he knew nothing about those at all.

We then asked him again if he had passed any of the counterfeit notes, and he said that, yes, he had, that he had passed approximately four to six at unidentified roadside restaurants in New Jersey and along Route 46. He also told us that he had destroyed some of the notes because of poor printed condition, some had ink streaks on them, some were only printed on one side.

We then questioned him and asked him again, "What about the savings bonds, the Bon Ami certificate and the [fol. 33] money orders?" and he told us that he had found these on the salesroom floor. We told him that we did not believe this and what was the truth. And then he finally told us that he had received these from someone, but that he would not name the person who had given them to him.

We then told him he was under arrest and asked him to accompany us to our office.

Q. I show you what has been marked as Government's Exhibit 8 for identification—

Mr. Fanning: Withdrawn.

I offer Government's Exhibit 8 for identification in evidence at this time.

Mr. Germaise: No objection, your Honor.

The Court: Received.

(Government's Exhibit 8 for identification received in evidence.)

Mr. Fanning: May I read it to the jury, your Honor?

The Court: Yes.

Mr. Fanning: This Bon Ami certificate is registered in the name of R. Paul Weesner, care of Bon Ami Co., 445 Park Avenue, New York 22, New York. In the back there is a transfer certificate attached: "For the value received,

[fol. 34] I hereby sell, assign and transfer unto Bernard E. McFarland 100 shares of the common stock of Bon Ami," signed "R. Paul Weesner."

By Mr. Fanning:

Q. Would you continue? You said you placed him under arrest. Where did you take him?

A. We took him to our office at 90 Church Street, New York City.

Q. And at 90 Church Street, what, if anything, did you do?

A. Well, we fingerprinted him, photographed him, and took a personal history from him. We then reviewed the statements that he made to us with reference primarily to the counterfeit, and then the statements he did make were reduced to a typewritten statement.

Q. Would you describe the taking of that typewritten statement? Where was the defendant, who was typing, who was dictating?

A. The defendant was seated next to Agent Thomas Smith, who was doing the typing; I was standing behind Mr. Smith, more or less in between them both; and I would make statements based on what Mr. Berman had told me to Mr. Smith, after asking Mr. Berman if that was so, and [fol. 35] it would then be typewritten on paper by Agent Smith.

Mr. Fanning: Would you mark this as Government's Exhibit 9 for identification.

(Government's Exhibit 9 marked for identification.)

Q. While this is being marked, do you recall, before leaving the agency at 210 West 54th Street, any request by the defendant to make a phone call?

A. Yes, sir. He requested, or at least started to make a phone call, and I asked him who it was to and he said he was calling his friend. I told him he could not make any phone calls at that time, and at that time we permitted him to—one of the men who was originally at the desk when we first entered was still there, and he asked this gentleman to make the phone call for him.

Q. And referring back again to when you were in the agency at 210 West 54th Street, did you inquire of the defendant as to his authority to store these boxes in the storeroom?

A. Yes, sir. When—as I said, when I first found the two boxes, and in his presence, before I took the two boxes from the shelf, I asked him if any of the boxes were his. [fol. 36] And after I had taken down the two and found that the top one contained a majority of his papers, I asked him what the story was, and he told me that he had put them—the both boxes in the storeroom without the owner, Lou Okun's permission or knowledge.

Q. I show you what has been marked as Government's Exhibit 9 for identification and I ask you, is that the statement that you referred to that was typed?

A. Yes, sir, this is the original of that statement.

Q. And was this shown to the defendant after you had completed typing it?

A. It was shown to him and he read it.

Q. And did he make any comment with respect to it?

A. I asked him to sign it, and he said that he wouldn't sign it until he had consulted an attorney. I asked him if it was true, and he said there was nothing wrong or objectionable in it, but that he wouldn't sign it until he consulted an attorney.

Mr. Fanning: At this time, your Honor, I offer in evi- [fol. 37] dence Government's Exhibit 9 for identification.

Mr. Germaise: I object to the admission of this Exhibit No. 9, your Honor, on the grounds that it is purportedly a confession, it was not prepared by the defendant and it is not signed by the defendant.

Mr. Fanning: Based upon the testimony that has been adduced so far, your Honor, I suggest that it has been adopted by the defendant, and he indicated there was nothing objectionable or wrong contained in the statement; and that the witness has testified in effect that this was prepared based upon information given by the defendant.

The Court: Do you press your objection?

Mr. Germaise: Yes, I do, your Honor.

The Court: Do you wish to have any preliminary examination of this witness concerning that?

Mr. Germaise: Yes, your Honor.

The Court: Go ahead and examine him.

By Mr. Germaise:

Q. Mr. Scanlon, how long was the witness questioned prior to one of the agents typing this purported confes- [fol. 38] sion?

A. In the office, tops a half hour.

Q. How long was it between the time when he was arrested or detained by you and your partner until the time this was typed?

A. We entered Morgan Motors at probably 5:30 or 5:45 p.m. and we left there approximately 7 p.m., a half-hour trip to the office, we had something to eat. We just took the statement starting about 8:30 p.m., finished approximately 9 p.m.

Q. In all, how many hours is that between the time this man was accosted by you initially and the time this statement was completed?

Mr. Fanning: I object to the word "accosted," your Honor.

Q. Approached by you.

A. From the time he was first approached it was approximately three hours.

Q. Three hours, sir?

A. Yes. Approximately, I say. We went in about 5:30, a quarter to 6, and we started taking the statement at 8:30, a quarter to 9.

Q. When did you finish taking the statement?

A. It took us about 15, 20 minutes to take the statement. [fol. 39] About 9 o'clock.

Q. And that is approximately a little over four hours, Mr. Scanlon, would you estimate?

A. No, sir.

Q. Less than four hours?

A. Three and a half.

Q. When you had all your discussions with the defendant and you drove downtown and you ate and you typed up this statement; is that correct?

A. Yes.

Q. Did the defendant ask to be represented by an attorney?

A. I believe he did ask to call an attorney, yes, sir.

Q. And was he granted permission to call an attorney?

A. Yes, sir, I believe he did call one and he couldn't reach one, or he was calling a friend to try and get one.

Q. Did the defendant exercise his desire to have an attorney present?

A. What do you mean by "exercise"?

Q. Did he have any attorney present?

[fol. 40] A. No, sir.

Q. Did he want to have an attorney present?

A. He asked to have an attorney, yes.

Q. Was he granted permission to make a phone call to an attorney?

A. Yes.

Q. Did he make that phone call?

A. As I recall, he made a phone call either to an attorney or to a friend to get an attorney.

Q. Did Mr. Berman call his wife from your office?

A. I believe he placed a long-distance call to Florida where she was and there was no connection made.

Q. How many phone calls did Mr. Berman make from your office?

A. As I recall, it was either two or three.

Q. The statements in this confession, are they in the words of one of the agents or—

The Court: You do not necessarily have to call it a confession; you can call it Exhibit 9 for identification.

Mr. Germaise: Thank you, your Honor.

Q. The phraseology and the wording of Government's Ex-
[fol. 41] hibit 9 for identification, are they the words and phraseology of an agent or Mr. Berman's?

A. The phraseology of an agent adopted from what Mr. Berman said.

Q. Did Mr. Berman affirmatively adopt this or did he take a path of least resistance and tell you something to the effect of "If you write it down, let it stay there," or "I just want to get out of here" or "I want to call my wife"? What did he say? Did he affirmatively say, "Everything in there is true and I adopt it"?

A. His statement was as I said: "There is nothing wrong or objectionable on it." He did not use the word "truth," no, sir.

Q. Why didn't he sign it?

A. He wanted to consult an attorney before he signed it.

Mr. Germaise: I have no further questions, your Honor.

The Court: Objection sustained at this time, without prejudice. You can renew the offer after you have laid more of a foundation.

Mr. Fanning: I will attempt to do that right now, your Honor, if I may.

[fol. 42] By Mr. Fanning:

Q. Mr. Scanlon, did you take this defendant to the U. S. Courthouse the following day?

A. Yes, sir, I did.

Q. For the purposes of what?

A. For the purposes of having him appear before a U. S. Commissioner.

Q. For arraignment; is that right?

A. Arraignment, yes.

Q. And were you present when he was interviewed by an assistant United States attorney, Mr. Paley?

A. Yes, sir, I was.

Q. At that time was this statement shown to the defendant?

A. Yes, it was.

Q. And did he read it?

A. I don't recall him reading it, no.

Q. Was he questioned about the contents of it?

A. Yes, he was.

Q. And do you recall what his response was?

A. Yes, sir.

Q. What did he say?

A. He stated—he said the statement was completely [fol. 43] true.

Q. When you were back at your office, prior to taking the statement, did you advise the defendant of his rights?

A. Yes, sir. That is the—

The Court: Well, that is for the Court to determine, whether he was advised of his rights. What did he say to him? That is what we want to know.

A. I would not say that I told him. It is the opening paragraph of the statement, which he read.

Q. Do you recall what the opening paragraph of the statement is?

A. The opening paragraph of the statement is to the effect that he does not have to say anything; that anything he does say can be used against him, and that he has every right to consult an attorney.

Q. Did you threaten him in any way?

A. No, sir.

Q. Did you make any promises to him?

A. No, sir.

Q. Was this statement given, so far as you know, freely and voluntarily?

A. Yes, sir.

[fol. 44] The Court: As I understand it, it is not a statement, is it? It is Exhibit 9; it is not a statement. It is a paraphrasing of some conversation which was had before with the defendant and it was reduced to writing. It is not a statement. I don't hear any objection on that ground from the defendant, but nevertheless there is a function that the Court has to perform under the circumstances.

Mr. Fanning: I renew my offer of the exhibit, your Honor.

The Court: You will have to show me more authority. I will sustain the objection.

I assume the objection is renewed?

Mr. Germaise: Yes, sir, it is, your Honor.

The Court: I sustain the objection at this time. You can show me some authority on that.

. . . . . .

[fol. 47] Cross examination.

By Mr. Germaise:

* * * *

[fol. 56] Q. I assume you went back into the showroom; is that correct?

A. After I asked his permission to search the desk and he gave it, we returned to the showroom.

Q. Where did you ask his permission to search the desk?

A. In the automobile.

Q. While you were in the automobile?

A. Yes, sir.

Q. And what did you say to Mr. Berman?

A. I said, "Do you have any objection to us searching your desk?"

He said, "No. Go ahead."

Q. Did you or Agent Martin make the request of Mr. Berman for permission to search his desk?

A. I believe I did.

Q. Can you recall Mr. Berman's exact reply to you at that time?

A. Not his exact reply, no, sir.

Q. If I said to you, Mr. Scanlon, that Mr. Berman replied to you, "Can I stop you?" in a questioning manner, does that recall to you Mr. Berman's exact words?

A. It does recall that he did not say that.

[fol. 57] Q. He did not say that?

A. No, sir.

Q. Do you recall what he did say?

A. The general context of his answer was, "Yes, go ahead and search it."

Q. Thereupon, did you and Agent Martin and Mr. Berman re-enter the showroom?

A. Yes, sir.

Q. Where did you go when you re-entered the showroom?

A. I went to the desk.

Q. And where did Agent Martin go?

A. To the desk.

Q. Did anyone go toward the rear of the room?

A. No, sir.

Q. Nobody went beyond the desk; is that right?

A. Not at that time, not upon initially entering the sales-room, no, sir.

Q. Well, initially upon entering the sales room you and Agent Martin went to the desk. Was Mr. Berman with you?

A. Yes, sir.

Q. The three of you stopped at the desk?

A. Yes, sir.

[fol. 58] Q. Did anyone proceed past the desk at any time?

A. Yes, sir, I did.

Q. You did?

A. Yes, sir.

Q. Where did you go?

A. I went towards the rear of the showroom.

Q. Was anyone with you?

A. Yes, sir, Mr. Okun.

Q. I beg your pardon?

A. Mr. Okun, the owner.

Q. Mr. Okun was with you?

A. Yes, sir.

Q. What did Agent Martin do while you were walking toward the rear of the showroom with Mr. Okun?

A. My back was to him.

Q. You did not see him; is that right?

A. Yes, sir, that's correct.

Q. Did you effect a search of Mr. Berman's desk?

A. I looked through one or two drawers on the left side as you face it.

Q. Did you find any contraband articles?

A. No, sir.

[fol. 59] Q. Did you find anything which would suggest the legality of the action which you were administering?

A. No, sir.

Q. Was the remainder of the desk searched?

A. Yes, sir.

Q. By you, sir?

A. No, sir.

Q. By whom?

A. By Mr. Martin.

Q. How do you know?

A. He told me.

Q. But you did not see that; is that correct?

A. No, sir.

Q. Where did you first encounter Mr. Okun?

A. I would say it was two or three feet from the desk.

Q. On the door side or on the rear room side?

A. Rear room side.

Q. Was he standing there waiting as you re-entered the showroom?

A. No, sir. I believe he approached us as we were searching.

Q. As you were searching the desk?

[fol. 60] A. Yes, sir.

Q. And you left the desk, Mr. Scanlon, and approached Mr. Okun two or three feet from you?

A. Yes, sir.

Q. And what did you say to Mr. Okun, if anything?

A. Mr. Okun asked me a question. In answer to his question I told him who we were and Mr. Berman was in some trouble.

Q. Mr. Okun, I assume, asked you to identify yourselves?

A. He asked me if he could help us, or something of that nature.

Q. What did you reply to him?

A. That we were Secret Service agents and Mr. Berman was in trouble.

Q. Did Mr. Okun question you as to the nature of the trouble?

A. Yes, sir, but I don't believe I told him.

Q. Did he ask you what you were doing on those premises?

A. He might have. I don't recall the exact question, though.

Q. What took place after you identified yourself and [fol. 61] said Mr. Berman was in trouble? Did you say something to Mr. Okun? Did Mr. Okun say anything to you? Or did the two of you just stand there?

A. No, I asked him if I could talk to him back in his office.

Q. And what was his reply?

A. "Yes."

Q. And did you go to his office?

A. Yes, sir.

Q. And where was Agent Martin at this time?

A. He was, as far as I know, still at the desk with Mr. Berman.

Q. And where was Mr. Berman?

A. At the desk with Mr. Martin.

Q. And your back was toward both of them; is that correct?

A. Yes, sir.

Q. Did you go to Mr. Okun's office with him?

A. Yes, sir.

Q. Did you enter the office?

A. Yes, sir.

Q. Did a conversation ensue between you and Mr. Okun?

[fol. 62] A. Yes, sir.

Q. What was the nature of the conversation?

A. I asked Mr. Okun what type of use of the premises Mr. Berman had. He told me all he had was desk space and a small cubbyhole to the right of the desk as you face the desk.

I asked him if he had the use of any storeroom or locker or anything of that nature, and he told me that he did not.

Q. He did not.

A. He did not.

I then asked him if we could search the rest of the premises, and he said, "Go ahead, look anywhere you please."

Q. Did you ask Mr. Okun any other question at that time? Now think, Agent Scanlon.

A. I don't recall any other question, no, sir.

Q. Did you ask Mr. Okun, "Where is your tool room?"

A. Yes, sir, I might have asked him that. Yes, I did.

Q. Did he reply to this question?

A. Yes, sir.

Q. What was his reply?

[fol. 63] A. That it was next door to the office, pointing towards the general direction of where the tool room was.

Q. Did Mr. Okun tell you that he did not have a tool room but that he stored tires in a rear room?

A. He could have told me that, yes.

Q. Sir, I ask you to please try to recollect as exactly as possible the substance of these conversations because it is very important to this case.

What did you ask Mr. Okun with respect to permission to search the premises?

A. After I had asked Mr. Okun if he had a storage room and he told me that he had and he told me where it was, I asked him if we could search it. He told me that we could search anywhere we pleased, to go ahead.

Q. Are those the words Mr. Okun used, to the best of your recollection?

A. To the best of my recollection, yes, sir.

Q. Did Mr. Okun ask you for a search warrant?

A. No, sir.

Q. Did you tell Mr. Okun you did not have a search warrant?

A. I did not mention it to him, no.

[fol. 64] Q. The question of search warrant did not occur at all in this conversation with you and Mr. Okun?

A. Correct.

Q. Nor did it occur in the conversation between you and Mr. Berman?

A. Correct.

Q. After receiving the alleged, if you will, permission by Mr. Okun to search the premises, what did you do immediately thereafter?

A. Mr. Okun and I walked into the storage room, tool room, call it what you may.

Q. You left Mr. Okun's office?

A. Yes, sir.

Q. With Mr. Okun?

A. Yes, sir.

Q. And you went into the rear room?

A. Yes, sir.

Q. Was the light on?

A. No, sir, it was dark.

Q. The door was open, sir?

A. I believe it was open, yes.

Q. Who put the light on?

A. Mr. Okun.

Q. To the best of your knowledge, where was Agent [fol. 65] Martin at this time?

A. He was still in the vicinity of Mr. Berman's desk.

Q. And where was Mr. Berman?

A. With Mr. Martin.

Q. Agent Scanlon, could it be possible that you were accompanied by Agent Martin into the rear room and not by Mr. Okun?

A. Impossible.

Q. Impossible, sir? Mr. Okun was definitely with you.

A. Positively.

Q. Now, sir, upon entering the rear room with Mr. Okun, did Mr. Okun remain with you?

A. Yes, sir.

Q. Did Mr. Berman or Agent Martin come into the rear room?

A. Both of them did together.

Q. Together. How long after you and Mr. Okun entered the room did Agent Martin and Mr. Berman enter the room?

A. A few minutes.

Q. A few minutes. What did you do during this time interval, this few minutes?

[fol. 66] A. After Mr. Okun put the light on, I turned and saw Mr. Martin and Mr. Berman were still in the vicinity of the desk and I waited for them to join me.

Q. You did nothing; you didn't do any searching, you didn't touch anything; you just waited?

A. Yes. I looked around the storeroom in the sense of using my eyes.

Q. After you were joined by Agent Martin and Mr. Berman, what did you do then?

A. I asked Mr. Martin—I had seen several cartons on the shelf in this storeroom. I asked Mr. Berman if any of them were his. He told me that they were not, none of them were his. With that I took the two end cartons off the shelf.

Q. Agent Scanlon, when you first saw the boxes, were Agent Martin or Mr. Berman in the room or was this while you were using your eyes?

A. This was while I was using my eyes.

Q. Did you inquire of Mr. Okun as to the nature of the boxes?

A. I believe I did, and he told me that everything in there was his.

Q. Mr. Okun told you the boxes were his?

[fol. 67] A. Everything in there was his, including the boxes.

Q. Did Mr. Okun characterize the boxes or their contents in any other way?

A. I don't recall him characterizing them in any other way, no, sir.

Q. Did Mr. Okun say to you, "These are my records"?

A. Yes, sir, he might have used that, referring to the cartons, yes, sir.

Q. How many boxes were there?

A. I don't remember exactly. I didn't count them. But I would say between six and ten.

Q. Six and ten cartons. Were they all of the same type, same size?

A. Yes. As I recall they were all of the same type and size.

Q. Did you search and inspect the contents of all eight or ten cartons?

A. No, sir, I did not.

Q. You did not. Did Mr. Okun identify a portion of those cartons as his?

A. Yes, sir.

Q. Is that the reason why you did not search those car-

[fol. 68] tons?

A. No, because Mr. Martin searched them.

Q. In other words, between yourself and your partner—

The Court: When was this identification made as to whether they were not cartons of the defendant?

The Witness: Mr.—

Mr. Germaise: May I ask the question, your Honor?

The Court: You ask it.

By Mr. Germaise:

Q. When was the identification of the cartons made?

A. Which cartons? The two—

Q. To distinguish between the cartons belonging to Mr. Berman and the ones belonging to Mr. Okun.

A. Originally Mr. Okun said they were all his until we found two were Mr. Berman's.

Q. He pointed to all of them?

A. He did not point, I just asked him.

Q. He said they were all his?

A. Yes.

Q. When did you find out the two were not?

[fol. 69] A. After I took the two off the shelf, when Mr. Berman and Mr. Martin joined me.

Q. Between yourself and Agent Martin, did you inspect each and every carton that was in that rear room?

A. Yes, sir, I believe we did.

Q. Did you find in fact that several of the cartons did belong to Mr. Okun?

A. Yes, sir, the remainder did.

Q. And what were in those cartons? What was in those cartons?

A. Papers.

Q. Pertaining to what?

A. I did not go through every paper.

Q. Did you yourself personally inspect one of the cartons which you subsequently found belonged to Mr. Okun?

A. I don't remember inspecting any of the ones that belonged to Mr. Okun. As I say, I believe Agent Martin inspected those.

Q. Approximately two cartons belonged to Mr. Berman and approximately six to eight cartons belonged to Mr. Okun?

A. Yes.

Q. And you inspected Mr. Berman's two cartons?

[fol. 70] A. Yes.

Q. And Agent Martin inspected the other six or eight cartons?

A. To the best of my recollection, yes, sir.

Q. Now, sir, how did you find out that two of the cartons belonged to Mr. Berman?

A. By going through the papers in them.

Q. Was Mr. Okun apprised of the fact that two of the cartons that he had previously said were all his belonged to Mr. Berman?

A. Yes, sir. He was standing there.

Q. Was he surprised at this?

A. Yes, sir.

Q. He was surprised that Mr. Berman had two cartons amongst his?

A. Yes, sir.

Q. Did he say anything?

A. Yes, sir.

Q. What did he say?

A. He expressed surprise.

Q. In any way?

A. I don't remember his exact words. He said something to the effect that he did not know they were there.

* * * * * * *

[fol. 80] Q. Did you proceed to leave the showroom and the premises entirely, you, Agent Martin and Mr. Berman?

A. No, sir, we went to Mr. Berman's desk.

Q. What did you do at Mr. Berman's desk?

A. As I recall it, Mr. Berman started to make a phone call. I asked him who it was to. He said it was to a friend. I told him that he couldn't make the phone call.

He then asked me if he could give the phone number to his friend or employee, I forget the man, what capacity he was there in, and I told him it was all right. And thereupon he had a conversation with the man, giving him a phone number and a name, I believe, and asked this man to call this person.

Q. Was this person a lawyer or his wife, to the best of your knowledge?

A. I don't know who he was.

Q. Do you know whether it was a he or a she?

A. It wasn't his wife, because his wife was in Florida. I believe it was a friend.

[fol. 81] Q. You say this, but you don't know. I mean his wife does have a telephone, he could telephone her in Florida?

A. I know it wasn't the wife because he did not ask for long distance when he started to dial the number on the phone.

Q. Agent Scanlon, I ask you now not to theorize and not to come to conclusions, and I ask you this question: Is it not possible to directly dial any place in the United States?

A. I don't know if it was at that time.

Q. Is it at this time?

A. Yes, sir.

Q. There are code numbers, aren't there, for long-distance?

A. Yes, sir.

Q. And you can place calls without dialing a long-distance operator?

A. Yes, sir.

Q. So it is an assumption on your part, is it not, sir, that it wasn't his wife because he did not ask for the long distance operator?

A. It is an assumption.

Q. Subsequent to this episode with the phone call, what [fol. 82] transpired?

A. Mr. Berman, Agent Martin and I left the showroom.

Q. Left the showroom. At what time was this, sir?

A. I would say it was approximately 7, 7:15.

Q. 7, 7:15. And did you go directly to 90 Church Street?

A. Yes.

Q. And after stopping to eat for a brief bite, I assume you went up to your office?

A. No, sir, we had food brought in.

Q. You had food brought in?

A. Yes, sir.

Q. You did not eat downstairs?

A. No, sir.

Q. When you went to your office in 90 Church Street, who was present?

A. Myself, Agent Martin, Mr. Berman, Agent Smith and the special agent in charge, Mr. Motto.

Q. In all there were how many employees of the United States Secret Service?

A. Four, as I recall.

Q. I believe there was one more, Mr. Scanlon, if you can [fol. 83] search your memory for it.

A. One more? You can name him. I will tell you whether he was there or not. I only recall four at this time.

Q. What transpired when you entered your office?

A. Mr. Berman was placed in a room we use for prisoners, took his prints, photograph and personal history.

Q. Was he questioned with respect to the instant crime, alleged crime?

A. Yes, sir. We then—

Q. This, sir, was somewhere between 7 and 8 o'clock?

A. Yes, sir, I would say that.

Q. Was Mr. Berman at this instant—and I say "this instant" referring specifically to the time in 90 Church Street in your office prior to any questions being asked of him—was he at that time advised of his constitutional rights?

A. No, sir.

Q. To your knowledge, nobody at that time told him he had the right to obtain counsel?

A. In the office?

[fol. 84] Q. In your office.

A. No, sir, not in the office.

Q. Did questioning of Mr. Berman commence in your office?

A. Yes, sir.

Q. Was Mr. Berman fingerprinted?

A. Yes, sir.

Q. Was his picture taken?

A. Yes, sir.

Q. Did Mr. Berman at that time say anything about wishing or desiring to call an attorney or his wife?

A. He expressed a desire to call his wife. He expressed a desire to consult with an attorney. I don't recall whether he asked to call one.

Q. Was Mr. Berman offered the facilities of your office, or was his attention drawn to a telephone with which he could communicate with an attorney or his wife?

A. Yes, sir.

Q. He was. Did he take advantage of the use of the telephone?

A. Yes, sir.

Q. And whom did he call?

[fol. 85] A. I believe he made one call to a friend and he attempted to contact his wife.

Q. Was this immediately upon being brought into 90 Church Street that this was done?

A. No, sir.

Q. This was further on in the evening, was it not?

A. Yes, sir.

Q. Did you accompany Mr. Berman to the telephone?

A. The telephone is in the same room, sir.

Q. Is it a coin machine?

A. No, sir, it is an office phone.

Q. Did you leave 90 Church Street and in particular the office where Mr. Berman was being questioned from 7 o'clock at night until the time that Mr. Berman was brought to West Street, to the Federal House of Detention?

A. Yes, sir.

Q. You did leave?

A. Yes, sir.

Q. So you were not present throughout?

A. No, sir.

Q. So if something transpired, you may not know about [fol. 86] it?

A. It is possible.

Q. Agent Scanlon, to the best of your memory, and referring to yourself in particular, were any threats or promises made to Mr. Berman with respect to his cooperation with your bureau?

A. No, sir.

Q. Do you recall anything being said of the nature that if Mr. Berman cooperates it would be easier with him?

A. No, sir.

Q. Do you recall anything whatsoever being told to Mr. Berman about the threat of publicity which would disgrace his family and ruin his business unless he cooperates with your agency?

A. I believe Mr. Berman was quite concerned about publicity.

Q. Was anything said to Mr. Berman by a fellow agent in your department?

Mr. Fanning: If you know.

Q. Always qualified by that, Mr. Scanlon, if you know.

The Court: That is understood. He is only testifying to what he knows.

[fol. 87] A. Would you repeat your question, please?

Q. I am asking you if any member, any co-agent, co-employee of yours, made any statements to Mr. Berman

with respect to publicity in the newspaper that would tend to disgrace his family and/or destroy his business.

A. I don't recall any such statement, no, sir.

Q. Would you recall Mr. Berman's concern about publicity?

A. Yes, sir.

Q. Do you recall any retort by any co-agent of yours to this concern of his?

A. No, sir, I don't.

* * * * * * *

[fol. 102] Redirect examination.

By Mr. Fanning:

Q. Were all the admissions made by the defendant prior to the time when you left the Secret Service headquarters and went home that night?

A. Yes, sir.

Q. What time was that?

A. Approximately 9 o'clock.

Q. So then it was what time from when you first saw the defendant Berman to the time that you left to go home [fol. 103] that evening?

A. Approximately three and a half hours.

Q. So that in that three and a half hours then you had concluded questioning the defendant, you yourself?

A. Yes, sir.

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[fol. 122] March 11, 1963

HARRIS MARTIN, called as a witness by the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fanning:

* * * * * * *

[fol. 123] Q. And when was the first time that you met the defendant?

A. On the evening of November 2, 1962.

Q. Will you tell us what time it was, and what place?

A. Approximately five forty-five, six o'clock, somewhere around there.

Q. And where was it? And were you alone or with someone?

A. I was with Agent Scanlon of the Secret Service at 210 West 54th Street in New York City.

Q. At that time did you have a conversation with the defendant?

A. Yes, I did.

Q. Will you tell us what that conversation was?

[fol. 124] A. I was with Agent Scanlon, and while Agent Scanlon was questioning the defendant I interposed some questions also. I asked the defendant if he knew one John Ruoto from Newark, New Jersey, and if he had had any dealings in counterfeit money with John Ruoto, to which he replied—

Q. If I can interrupt, will you state the conversation that took place between yourself and the defendant or with Agent Scanlon in the company of the defendant from the first time that you approached him.

A. Yes. Upon arrival at the address, 210 West 54th Street, the Morgan Motors, we went inside and spoke with Mr. Berman. We identified ourselves to Mr. Berman and told him that we would like to speak to him privately.

Mr. Berman suggested that we step outside into a car, which was parked immediately in front of the address.

The three of us got in the car. We had already identified ourselves, and we told Mr. Berman that we had information that he had been dealing in counterfeit currency, namely, with John Ruoto. Mr. Berman stated that this wasn't true; [fol. 125] he couldn't imagine where we had heard such a thing, that he had never dealt with counterfeit currency in his life; he never remembered even having had a counterfeit bill.

Q. Did he state whether he knew John Ruoto?

A. He stated that he had known John Ruoto since they were both in the automobile business, and his knowledge of Ruoto—he had known him, I believe, for a year or two from the time Ruoto had a used-car business in New Jersey.

But he said that that was the extent of his knowledge of Ruoto or his acquaintance with Ruoto. He did know that Ruoto had a place of business on Bloomfield Avenue in Newark.

Q. Was there any further conversation between you?

A. Finally in our conversation with Mr. Berman we asked him if we could search his desk at the Morgan Motors. We asked him if he had access to the entire premises or just what part of the premises was under his control, because we noted that the name Morgan Motors appeared on the window and we were of the opinion or of the information that Mr. Berman's business was known as Eastern Auto Leasing. Mr. Berman told us that he merely rented [fol. 126] desk space at 210 West 54th Street, and that he didn't have the entire premises.

We asked him if he objected if we looked into his desk and made a search, and he said no, not at all, he had nothing to hide, and we were perfectly free to search wherever we pleased.

Q. Did you ask him specifically about any other place in the premises, any other area in the premises, if you recall?

A. As I recall, we asked him if he had access to any other part of the premises, and he said no. We didn't specify any other particular part. As I recall, he just stated that he had his desk space, and that was it; nothing further.

We then went into the showroom and on the righthand side, about halfway back, there was a desk which Mr. Berman identified as his. And we began to search through the drawers of the desk, all three of us, Mr. Berman, Mr. Scanlon and myself—when I say Mr. Berman searched, he exhibited an interest in helping us search and identified various articles that we would see in the desk drawers as being contracts or playing cards, or something of that nature.

Finally Mr. Okun came up and exhibited interest in what [fol. 127] what was going on.

Mr. Scanlon went off to the side and spoke with Mr. Okun, and I remained at the desk with Mr. Berman and completed the search of the desk.

Q. Did you see where, if any place, Agent Scanlon and Mr. Okun went?

A. Well, they stepped off to the side for a few minutes, and I later saw Mr. Scanlon back in the store room to the rear of the shop with Mr. Okun.

Q. Could you see that place from where you were at the desk?

A. Yes, you could look and see where the doorway was.

Q. Then what happened?

A. Mr. Berman stayed with me, and we went back to the storeroom area. And Mr. Okun was there, and he stated that this was his space, and that he had business records stored on the shelves in this room, and that there was not supposed to have been anything of Mr. Berman's or anyone else's in there other than his, Mr. Okun's.

Mr. Berman stated then that he didn't have anything there and so Mr. Scanlon told me that Mr. Okun had approved a search of his premises by us.

[fol. 128] Mr. Scanlon, I believe, had already commenced a search of the boxes in the area inside of the storeroom when I got there.

Q. Had he taken boxes down by that time?

A. I don't recall if he had taken a box down or not, to tell the truth. I remember that he was looking around and searching. I also began searching some of the boxes—

Q. By searching, what do you mean—taking them down?

A. Taking them down or looking into them if a box was low enough to look into. The boxes I looked into first all contained business records of Mr. Okun. I searched, well, all of the boxes that had Mr. Okun's business records in them.

Finally Mr. Scanlon had a box down there in which he was looking, and I heard him say to Mr. Berman, "What's this?"

And he had in his hands some U. S. Savings Bonds.

I went over there also— I went over—it was just a step away; it is a rather small storeroom—and we were all standing right next to each other while we were making the search.

[fol. 129] Q. I show you what has been marked Government's Exhibits 1 through 6 in evidence and ask you if these are the bonds you referred to (handing to witness).

A. Yes. I can recognize my initials on these bonds.

Q. And when did you initial these bonds?

A. That night. While Mr. Scanlon was looking at the bonds, which he had taken from the box, I looked in the box and took out an envelope which contained a quantity of counterfeit twenty-dollar bills. The quantity was later determined to be 110 counterfeits.

Q. Just before we get to that, was any conversation had with the defendant with respect to these bonds, and, if so, what was that conversation?

A. Yes. The defendant stated, when he was asked what the bonds were doing there, he stated he couldn't understand it. He had previously identified the box in which Mr. Scanlon was searching as a box of his business records. The records were in his name and he stated that he had—

Mr. Germaise: May I ask that the witness be directed to be responsive to the question and not just relate a tale, [fol. 130] which is not being asked of him at this time.

The Court: Well, I think he is just continuing to tell what happened.

There is no question before you at this point.

Mr. Germaise: Thank you.

The Court: I assume it is a simple question.

Q. I show you what has been marked as Government's Exhibit 7 in evidence and I ask you if that is the envelope and the contents containing the counterfeit bills you referred to in your testimony (handing to witness).

A. Yes, sir.

Q. And how do you identify those bills?

A. How do I identify the bills?

Q. Yes.

A. I identify them all as counterfeit bills.

Q. Are there any markings on there?

A. Yes. I have my initials and the date, November 2, 1962, on each of the bills.

Q. And did the defendant initial any of those bills?

[fol. 131] A. Yes, sir, that evening the defendant at our request initialed, I believe, four bills.

Mr. Fanning: May I show these bills to the jury, your Honor, at this time?

The Court: Surely.

(Exhibit handed to jury.)

Q. I show you what has been marked Government's Exhibit 8 in evidence and I ask you if you have ever seen that before (handing to witness).

A. Yes, I have.

Q. And where did you see that for the first time?

A. This stock certificate was also taken from the box.

Q. By you or by Agent Scanlon?

A. I have my initials on it. I don't recall. I believe Agent Scanlon.

Q. You were saying that after you had found the envelope with the counterfeit bills in it, you had a conversation with the defendant?

A. Yes.

Q. Would you tell us what you said to him and what he said to you?

A. I told him that these bills were counterfeit and asked [fol. 132] him where he got them and at first he replied that he couldn't understand how they got there; he didn't know anything about them. And I asked him again, I said, "Are you sure you didn't get these from John Ruoto," and he said, "Well, yes," that he had gotten them from John Ruoto. He had bought them but he had not paid the full price for them. He still owed Ruoto money for them.

Q. Did he mention what the price was?

A. Yes. He said that the price was about ten per cent. He did not know exactly how much it would be.

Q. At that time did you ask him whether or not he had passed any of these bills?

A. I believe later in the evening we asked him if he had passed them.

Q. These bills you referred to as counterfeit, would you call them a good counterfeit?

A. Yes, they are deceptive.

[fol. 133] Q. And by "deceptive" you mean—

A. That they are readily passed—

Mr. Germaise: I object, your Honor. It is irrelevant whether they are good counterfeit or passable counterfeit or improperly made counterfeit. The fact that they are

counterfeited is established, and the quality of them is immaterial.

The Court: I will let him answer.

Overruled.

A. They are classed as a deceptive bill.

Q. By that what do you mean?

A. That they are close enough in likeness to the genuine bill to be readily passed.

Q. Did there come a time when you placed the defendant under arrest?

A. Yes. After discovery of the counterfeit notes in the box and the defendant's admission that they were his, we notified him that he was under arrest.

Q. And then what did you do and where did you go?

A. We completed our search, and then Agent Scanlon, the defendant and myself returned to the office downtown at 90 Church Street.

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[fol. 136] Q. Did there come a time when you inquired of the defendant whether or not he passed any of these counterfeit bills or found any?

A. Yes, there did.

Q. When was that and what was the question and the answer, if any?

A. Later that evening, at our office at 90 Church Street, the defendant admitted to us that he had—or described to us the manner in which he had obtained these bills from Ruoto—

The Court: I don't want to interrupt you. You say he [fol. 137] admitted. There is no objection to that, but just tell us what he said.

A. He told us that he had indeed passed several of these notes, these counterfeits, at roadside stands along Route 46 in New Jersey, generally in the Parsippany area. He did not recall any of the specific instances, he said.

Q. Did you make any inquiry of the defendant whether or not this was all the counterfeit money that he had?

A. Yes, we did.

Q. And what was his response?

A. The defendant stated that what we found in the box was the remaining counterfeit of all he had.

Q. He said "the remaining counterfeit"?

A. Yes.

Q. What did he mean by that?

A. He had stated that aside from the notes that he had passed he had destroyed some which were poorly printed.

Q. Did he say why?

A. He stated they were poorly printed or printed on one side, and he felt that they were too imperfect to pass.

[fol. 138] Q. And did you ask him as to the source of the bonds and the stocks?

A. Yes, we did.

Q. And what was his response to that inquiry?

A. His first response was that he knew nothing about the certificates. His second response was that he had found them lying on the floor in the showroom and had just picked them up and put them in the box. And the last response he gave was that the bonds had been given to him by someone, but he refused to name that person.

Q. Prior to leaving the premises at 216 West 54th Street, did the defendant make any request to make a telephone call?

A. Yes, I believe he did.

Q. Can you recall what was said in that regard?

A. He wanted to call someone, I don't recall who. We did not permit him to make a phone call, but we permitted him to speak with a gentleman whom he termed his partner there so that his partner could make the phone call for him. Whether the call was made, of course, I have no knowledge.

Q. There came a time when you arrived back to your [fol. 139] office with the defendant; is that right?

A. Yes.

Q. And then what did you do at that time?

A. At the office we went through our normal procedures of fingerprinting, photographing, taking a personal history, which is a routine procedure, and then we questioned the defendant about the contraband that had been found.

Q. Will you tell us what time it was you arrived at the office, what time it was that you began the taking of the personal history and the fingerprinting, and so forth, and what time you concluded?

A. I would say it must have been 7:30 or 8 o'clock at the office.

Q. When you arrived at the office?

A. After 7 o'clock, yes.

Q. And about what time was it that you concluded his fingerprinting, the taking of the personal history and the other routine matters that you referred to?

A. Approximately 9 o'clock, I would say; maybe shortly thereafter.

Q. I show you what has been marked Government's Exhibit 9 for identification and I ask if you can identify that. [fol. 140] A. Yes, I can.

Q. How was that prepared? Who was present and exactly who did the preparing of it?

A. Present were the defendant, Agent Scanlon, Agent Smith, myself and Agent Motto.

Q. Who typed it?

A. Agent Smith typed the page. Mr. Scanlon asked the defendant questions concerning the counterfeit $20 notes, where he had gotten them, and so forth, what he did with them. The defendant answered the questions, and Agent Scanlon would repeat the defendant's answers, which would be typed by Agent Smith, the defendant acknowledging the correctness of Agent Scanlon's interpretation after each sentence.

Q. When that Exhibit 9 for identification was completed, was it shown to the defendant?

A. Yes, it was.

Q. And was he given an opportunity to read it?

A. Yes.

Q. Did he apparently read it?

A. Yes, he appeared to.

Q. Did he make any comment with respect to it?

A. Yes, he was asked to sign it and he stated that there [fol. 141] was nothing untrue or nothing wrong in there but that he did not wish to sign it until he had had a chance to consult with an attorney.

Q. By the way, aside from the routine matters and the questioning you referred to, did you have any food?

A. Yes. I believe upon arrival at the office we offered the defendant something to eat. I don't believe he ate,

though. I think he just had coffee and he wanted a cigar, which he got.

Q. Did he have a cigar?

A. Yes, sir.

Q. During the preparation of Exhibit 9 for identification and prior thereto, or at any time thereafter, were any promises made to this defendant?

A. No.

Q. Were any threats made to him?

A. No.

Q. You were not present the following day when he was arraigned, were you?

A. No, I was not.

Q. About what time was it that the preparation of Exhibit 9 for identification was completed?

A. Well, I would say that that Exhibit 9 was in prepara-[fol. 142] tion about 9 o'clock, probably shortly before, and it may have terminated at 9 or shortly thereafter.

Q. After that time was any further questioning of the defendant had?

A. No.

Q. What time was he taken—

A. Well, I say no. En route from our office to the Federal Detention Headquarters at West Street we may have repeated a question or two, but there was no thorough questioning past that time.

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Cross examination.

By Mr. Germaise:

* * * * * * *

[160] Q. At this point, sir, did you and Agent Scanlon identify yourselves to Mr. Okun?

A. By the time I got back there Mr. Okun in his conversation indicated that he knew who I was, and I told him I was a Secret Service agent.

Q. Did you ask Mr. Okun for permission to search the premises?

A. Yes, I did.

Q. Now, what did you ask Mr. Okun?

A. I asked Mr. Okun if he had any objection if I walked in the storeroom or about the showroom, and he said none whatsoever.

Q. Did you term the backroom the storeroom?

A. Sir?

Q. Did you term the backroon the storeroom?

A. I believe I called it a toolroom.

Q. Who asked, if anyone asked, Mr. Okun where the toolroom was?

A. That wasn't me, I don't believe.

Q. Did Mr. Okun reply in the affirmative to your request?

A. Do you mean to search the room?

[fol. 161] Q. Yes.

A. Yes.

Q. What were his exact words?

A. I can't quote verbatim but his words were, "Yes, go right ahead. I have nothing here." He told us Mr. Berman had nothing in this room.

Q. Did Mr. Okun take you to the room?

A. Mr. Okun took Mr. Scanlon to the room.

Q. Did you notice Mr. Okun point to the room and not go to the room with Agent Scanlon?

A. No, sir.

Q. Did you notice Mr. Okun point to the room at all?

A. No, sir.

Q. When you got to the back room, the rear room or the toolroom, as we termed it, was that locked or unlocked?

A. When I got there it was open. I don't know if you could lock it or not.

Q. In your whole time in that showroom did you ever see the door to that room there, if there was a door there, closed?

A. I don't recall. No, I don't believe so.

Q. These boxes that we are speaking of, these cartons, [fol. 162] where were they?

A. As you entered the storeroom they were to the left.

Q. How far to the left from the door, from the entrance to this room?

A. Well, there were some shelves immediately adjacent, maybe a foot, and the boxes were on the shelves.

Q. Now, what height were these shelves?

A. I believe there were two, the upper shelf being maybe five feet off the ground—about that, I guess.

Q. Five feet off the ground?

A. Yes, sir, the upper shelf.

Q. And the lower shelf?

A. Something less.

Q. Where were Mr. Berman's boxes or the box that was subsequently identified as belonging to Mr. Berman, on the upper shelf or the lower shelf?

A. I believe that they were on an upper shelf. I didn't find those boxes, so I am only going by recollection. I believe that they were on an upper shelf down to the extreme end.

Q. At any rate, were these boxes within the reach of an [fol. 163] average sized fellow, say, yourself?

A. Oh, yes, sir.

Q. You could look into them also, sir, could you not?

A. The upper shelf boxes, I don't recall whether you could or not. Perhaps. I don't recall that.

Q. Did you look into some boxes, sir, without taking them down?

A. I believe I took them down and I looked into them.

Q. Didn't you just testify on direct examination that there were boxes there low enough to be looked into?

A. I was referring, of course, to the ones on the upper shelf.

Q. You mean the lower shelf.

A. The upper shelf would be the ones I would take down to look into. The lower ones, yes, you could look into.

Q. How many boxes were there all together, Mr. Okun's and Mr. Berman's?

A. Maybe eight or ten.

Q. How many did you look into?

A. I don't recall the number.

[fol. 164] Q. Well, let me ask that to you this way: Did you and Agent Scanlon look into each and every box there?

A. I would say that we pretty much did.

Q. Pretty much did?

A. I would say this, yes, sir, we did. We looked into each box that was there, yes.

Q. Did there come a time when Mr. Okun pointed to certain boxes and said, "These are mine," and you didn't bother looking into those boxes?

A. I believe we may have given them a more cursory look, but we looked into them.

Q. Did you look through all of Mr. Okun's business papers?

A. Yes, sir, we searched the boxes and satisfied ourselves of what was in them.

Q. What was in them?

A. Business records.

Q. Were these ledger sheets, bank statements? What business records do you refer to?

A. At this date I can't recall. They were books, business records, accounts. What more, I can't describe.

Mr. Fanning: Might I inquire which boxes he is refer- [fol. 165] ring to?

The Witness: I assume he is referring to Mr. Okun's boxes.

Mr. Germaise: I am referring to Mr. Okun's boxes.

Mr. Fanning: Thank you.

Q. Did you give a more thorough examination to the boxes belonging to Mr. Berman?

A. No, sir, I wouldn't say that.

Q. Now did you see the location of the envelopes that we have here in evidence, which contain contraband material within the box?

A. Yes. I took one of the envelopes out of the box.

Q. Now, which envelope did you take out?

A. The envelope containing the counterfeit currency.

Q. Now, the box in which it was situated, was that box sealed or open?

A. Well, of course it was open when I saw it. I don't believe it was sealed.

Q. It was open. Is that the answer?

A. Yes.

Q. Where was this envelope with respect to the rest of [fol. 166] the contents of the box?

A. Mr. Scanlon had been searching in the box and had removed or put aside some papers that were on the very top. So I don't know exactly where the envelope was prior

to that. It was laying down immediately on the side of the box when I picked it up.

Q. Immediately on the side of the box. Do you mean the other things were lying flat and that this was lying against the side of the box?

A. No, sir. The papers were not all in an orderly fashion in this box. They were just in the box, not in any orderly fashion.

Q. What was in the box? What were these other papers, the character of them?

A. Papers that said "Eastern Auto Leasing," sheets, typewritten sheets of numbers, which Mr. Berman alleged were serial numbers.

Q. Serial numbers of what, Agent Martin?

A. Of automobiles with which he was having dealings.

Q. You don't mean serial numbers of bills, money, currency?

A. No, I beg your pardon. No, sir. These were serial [fol. 167] numbers of automobiles with which he was concerned in his business.

Q. Were there other envelopes in the box?

A. There were letters and things, yes, sir.

Q. Were there any unopened envelopes?

A. I don't recall.

Q. Were there any envelopes that were sealed that you recall opening?

A. No. We wouldn't have opened an envelope. We would have asked him if it was not opened. You mean any mail or anything?

Q. Yes.

A. No, we would have had him open it.

Q. Do you recall making this request of Mr. Berman?

A. I don't recall.

Q. Now, sir, referring to both envelopes, did you inspect both of these envelopes? There were two, were there not, that contained the contraband articles?

A. Yes.

Q. Did you inspect the envelopes? Did you look at them?

A. Yes, after Mr. Scanlon showed me the one with the bonds, yes, and I saw the one with the counterfeit notes [fol. 168] in it.

Q. Did these envelopes have any identifying marks whatsoever?

A. I recall that they were just plain white envelopes.

Q. Did they have any return address, any printed address on them?

A. Not that I recall.

Q. Did they have any connection with Mr. Berman whatsoever, any connection that would identify them as the possession of Mr. Berman, looking at them?

A. None visibly, no, sir.

Q. Did you cause the envelopes to be prepared for fingerprinting?

A. No, sir.

Q. Do you know if anybody did?

A. I don't believe they were.

Q. Did you inspect the contents of both envelopes?

A. Yes, sir.

Q. Was there any identifying mark upon any of those contents that identified them as the personal possession of Mr. Berman?

A. At the time we took them, you mean we found them?

[fol. 169] Q. Yes.

A. No, there were no initials on them.

Q. Was the name on anything?

A. No, sir.

Q. Did you cause to have made ready for fingerprinting tests the contents of either of the envelopes?

A. No, sir.

Q. Did you ever see either of the envelopes in the personal possession of Mr. Berman?

A. No, sir.

Q. Did you ever see any of the contents of the envelopes or of either envelope in the personal possession of Mr. Berman?

A. No, sir.

Q. Did you ever see Mr. Berman pass any counterfeit money?

A. No, sir.

Q. Did you ever see any counterfeit money on the person of Mr. Berman?

A. No, sir.

Q. Was there anything contained in his desk?
A. No, sir.

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[fol. 410] March 13, 1963

Louis Okun, called as a witness by the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Germaise:

Q. Mr. Okun, what is your occupation, please?
A. I am in the automobile business.
Q. Do you maintain offices for this profession?
A. Yes, I do.
[fol. 411] Q. And where are such offices located?
A. 210 West 54th Street, Broadway.
Q. And what is the nature of those premises?
A. Used car business.
Q. Is it a showroom, sir?
A. Yes.
Q. Are you the lessor of the showroom from the landlord?
A. Yes.
Q. Do you have subtenants?
A. I have had.
Q. Was Milton Berman a subtenant of yours at some time?
A. Yes, he was a subtenant for about four months.
Q. What did Mr. Berman lease from you?
A. Desk space.

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[fol. 414] Q. Do you recall when the government agents and Milton Berman reentered the showroom?
A. Yes.
Q. Do you recall where each of those persons went?
A. When they came back in again?
Q. Yes.
A. That is when they asked me where the toolroom was.

Q. Who asked you, sir, if you remember?

A. These two gentlemen.

Q. Did the two gentlemen go into the tool room? Did one of them go?

A. They both went.

Q. Did they search Mr. Berman's desk?

A. Yes.

Q. And did they go into the toolroom before or after they searched his desk?

A. After.

Q. Mr. Okun, at any time were you asked for permission to search the premises?

A. No. The only thing they asked me was where the toolroom was, and I said, "This is not a toolroom; this is a storeroom."

Q. Mr. Okun, at any time were you asked for permission [fol. 415] to search the premises?

A. No. All they asked me was where the toolroom was and I showed them and I said, "You can do anything you like, but these are the records of my business right up on that shelf."

Q. Did you enter the toolroom or the back room or whatever you call it at any time?

A. Yes. When they went in there.

Q. Who went in first, sir?

A. The two gentlemen—I don't know their names, but I assume they were from the federal department.

Q. Were your records searched?

A. No.

Q. Did you see any of your boxes disturbed?

A. No.

Q. Did you see either of the federal agents going through your records?

Mr. Fanning: I just ask that defense counsel not lead the witness.

The Court: Try not to lead. Ask him questions.

Q. What did you see, Mr. Okun?

A. I saw them looking through an open corrugated box and when they were looking in that box, that is the time my customer came in and I went out of the place.

[fol. 416] Q. Was this open corrugated box your property?

A. No, it was not.

Q. Whose property was it?

A. It belonged to Mr. Berman.

Q. Did you know that Mr. Berman had this open corrugated box in the rear room?

A. To the best of my recollection I don't remember whether he did or not.

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[fol. 417] Cross examination.

By Mr. Fanning:

Q. Do you recall, Mr. Okun, my interviewing you on February 14th?

[fol. 418] A. Yes, I do.

Q. Do you recall we discussed what transpired on November 2nd at your place of business?

A. That's right.

Q. And do you recall whether or not you said anything different to me on that occasion than you said today in answer to counsel's questions?

A. I don't quite understand what you mean.

Q. Did you tell me what you told the agents that they could look anywhere they wanted to?

Mr. Germaise: May I object to the form of the question, your Honor, and may I request that the witness's own recollection as to what transpired be exhausted before his memory is refreshed by leading questions.

The Court: Well, this is cross-examination and he has a right to lead.

Q. Do you recall that?

A. Yes.

Q. And is that the truth?

A. I beg your pardon. Will you repeat that?

Q. Is that the truth?

A. What?

Q. That you told the agents they could look wherever they wanted.

[fol. 419] A. I told him they can do anything they want as long as they don't disturb my records.

Q. My question was did you tell the agents they could look anywhere they wanted to?

A. I don't recollect exactly the term I used, but I said they can do anything they like once I let them in the room as long as they don't disturb my records, which practically means the same, I guess.

[fol. 420] Q. Let me ask you—I will read these questions to you and these answers and let's see if this refreshes your recollection. Do you recall my asking you:

"Q. Did they ask you or indicate a desire to look in that room?

"A. They said, 'Where is that room?' and I said, 'Right there,' and I put the light on in there for them.

"Q. Do I understand you to say that one of the men said to you, 'We would like to look in there'? Is that what the agent said to you?

"A. I really don't remember. I told him, 'You could look any place you want'"?

Do you recall those questions being put to you and those answers?

A. Yes.

Q. And are those answers truthful, or were they truthful!?

A. Yes, they are truthful.

Q. Under your agreement with Mr. Berman did he have any use of the storeroom?

A. Well, we never discussed the storeroom for any use. [fol. 421] It wasn't a permanent thing; it was a temporary thing when Mr. Berman took the place.

Q. I asked you, under your agreement with him do you recall whether or not he was authorized to use the storeroom?

A. No, I don't think we ever discussed that. I don't think there was any authorization that entered the discussion about it at all. I don't think he had any authorization.

Q. Do you recall what you told me when I asked you that question or a question of like import?

A. That he wasn't authorized to use the room.

Q. I beg your pardon?
A. That he was not authorized to use the room.
Q. You said he was not authorized to use the room.
A. Yes.

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[fol. 430] A. I honestly don't recall him asking me, "Can we search it?" All he asked me is where the tool room was, and they said they wanted to look through the—I said the stock room, and I said, "You can go right ahead, as long as you don't disturb my records."
[fol. 431] Q. Do you recall saying, "Look any place you want"?
A. Yes, I did.

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[fol. 458]

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Fanning: The government submits that this unsigned document, its admissibility must be determined based solely upon the evidence of the government witnesses who testified with respect to its making, and according to that testimony, your Honor, the defendant participated in its making; he acknowledged the correctness of the contents and he adopted this as surely as if he had put his signature to it.

Further, when brought before Mr. Paley, he reaffirmed the correctness of it and answered the question "Is it completely true?" in the affirmative.

At that time he was in full control of his faculties, fully understood what the contents were, having read them before, and admitted on further examination that he understood what they were, and the fact of subsequent reaffirmation is particularly important because he did testify himself.

You recall that the circumstances under which it was made were rather trying, but of course the circumstances in Mr. Paley's office the following day were by no means trying, and he was not under any pressure; and if he reaffirms it under those circumstances, I think it is doubly admissible.

The Court: And you are pressing your offer on the [fol. 459] ground you believe it is necessary to establish your case?

Mr. Fanning: I believe it is necessary, your Honor, to establish the case for sure and to be able to argue to the jury that this man reaffirmed it at a later date, when there was no pressure brought upon him.

The Court: You have no further authority to give me other than what you have already handed me by way of a brief?

Mr. Fanning: Unfortunately I have no further authority.

The Court: Are you saying then that you have made an exhaustive search of the law that might be applicable under the circumstances?

Mr. Fanning: I wouldn't say that, your Honor. I just had, well, Monday evening after the conclusion of the court day to do some, and I don't represent that I exhausted the authorities, not at all.

The Court: All right.

Mr. Germaise: I object to its admissibility on the grounds that I don't believe the defendant stated that he reaffirmed it. I believe he denied he reaffirmed it.

It was not prepared by the defendant; it was prepared by witnesses that were presented by the government employees, agents of the Secret Service.

[fol. 460] The witnesses testified that not only didn't he affirm it, but in the preparation and while it was being prepared he stated, "Write whatever you want; I am not going to sign it anyway." He did not sign it, which buttresses his claim that he did not believe it had any effect so far as he was concerned.

He had no right to object to the government preparing this statement. He could not stop them from typing this statement. He never affirmed it as his own, and I believe that it would be prejudicial in this case.

What is contained therein—although I have not read it—I assume has been put into evidence by the admissions made by the defendant while he was in the custody of the United States Secret Service.

The Court: I will say this to you, that our research, in addition to that which was indicated by the memorandum

submitted on behalf of the government, has been reasonably exhaustive also. We find very little, if any authority, for it. I would say that there is a paucity as to authority for this type of document.

However, the defendant has taken the stand, which he did not have to do. He could have declined to take the stand and the Court would have charged that the jury was to draw no inference from the fact that he did not take the [fol. 461] stand. However, he has taken it.

And we have the testimony of Mr. Paley, the assistant United States attorney, and at least two of the agents of the Treasury Department.

My inclination is to depart from the usual rule in admitting a document of this nature in evidence and I am inclined to admit it with this departure from the usual procedure, that when it is admitted, I will permit its admission before the jury and immediately instruct the jury that the question of whether or not it was a voluntary statement is a question of fact for the jury to determine; and I will preliminarily charge the jury at that time, prior to summation, at the time it is admitted, that it is a question of fact for them to determine whether or not this was a voluntary statement.

I will instruct them then and I will instruct them in the main charge that it being a question of fact, if they determine that the statements contained in Exhibit 9 were not voluntarily given and were not the statements of the defendant, that they are to disregard the contents of the statement and give it no further consideration, if they reach the conclusion after they have resolved the question of fact. These are questions of fact created by the testimony here which are not within the province of the court. [fol. 462] Mr. Fanning: I think that is a appropriate instruction, your Honor.

The Court: Well, I asume that is a determination that will have to be made. You have offered it, and after considerable consideration and research, this is the determination.

You may have an exception to that.

Mr. Germaise: Thank you, sir.

The Court: And you may renew your exception in the presence of the jury.

Now, off the record.

(Discussion off the record.)

The Court: In making this ruling, I have taken into consideration the rights of the defendant in an effort to see that those rights in no way be jeopardized in ruling upon the admission of this particular exhibit.

In fairness to the defendant, it is my thought that it should be admitted with proper instructions, as I have indicated, for the reason that there has been so much discussion about it and it has been offered in evidence, not once but several times by the government; that it is a matter that should come before the jury so that they may resolve the question, rather than be speculating as to its contents.

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[fol. 463]

RENEWAL OF MOTION TO SUPPRESS EVIDENCE

Mr. Germaise: May I also renew my motion to suppress the evidence which was produced as a result of the alleged illegal search and seizure?

The Court: Yes. I have reserved on that and I will make a determination before you sum up.

Mr. Germaise: Thank you, sir. I expected a brief here which I respectfully request your Honor to read, if time allows. I expect it here at any moment. It has been in preparation now.

The Court: In the light of my original decision on your motion to reserve, I think it is proper to reserve until after a verdict.

[fol. 464] Mr. Germaise: Yes, sir.

The Court: Then we can consider the matter at that time; and if it is determined that the testimony upon which the result obtained is based upon any illegal procedures, the Court will have opportunity, ample opportunity, to make a ruling at that time.

My disposition, however, at the moment is to determine that the search was conducted with proper consent.

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[fol. 469]

RULING ON ADMISSION OF DOCUMENT OFFERED IN EVIDENCE

The Court: May I have the document?

(Handed to Court.)

The Court: Ladies and gentlemen of the jury, this is somewhat of an unusual departure from my regular practice in ruling on the admission of a document which has been offered in evidence. You heard much discussion about so-called Exhibit 9 for identification. It has been offered in evidence several times. And for your information it is a [fol. 470] paraphrasing of certain statements supposed to have been made by the defendant. I am going to overrule the objection of the defense and receive the document in evidence, with this instruction to you: That there has been some testimony here which relates to the question of whether or not the contents of this document were voluntarily given by the defendant. I am making this ruling at this time because undoubtedly counsel will wish to make some reference to it in their summations.

The Court is permitting it in evidence because, madam and gentlemen are the sole judges of the facts, and it becomes a factual matter of whether or not this was a voluntary statement by the defendant, if it be in the nature of an admission on his part and against his interests.

But, as I say to you, and I will say to you later on in the charge which I will give after the summations of counsel, you are to determine from the testimony which you have heard here from the witnesses whether or not the contents of this statement are voluntary on the part of the defendant. These are facts you must determine.

And I will further instruct you at this time that if you [fol. 471] determine that the contents of this statement were involuntary and not given by the defendant of his own free will, then after you have made that determination you will disregard it as you enter upon your further deliberations in the matter.

I trust I have made myself clear.

(Government's Exhibit 9 for identification received in evidence.)

[fol. 472] Mr. Germaise: Your Honor, may I now have my exception noted to your Honor's ruling, and may I cite a certain case which has just come to my attention in support of such contention.

The Court: You may.

Mr. Germaise: I would like to cite the case of Silverthorne Lumber v. United States, 251 U.S. 385 at page 391. Also cited at 40 Sup. Ct. 182.

And also, your Honor, United States v. Skeeters, 122 Fed. Supp. 52, in the District Court in California, a 1954 case.

I am also relying, sir, upon Takahashi v. United States, cited at 143 Fed. 2d 118, the Court of Appeals case for the Ninth Circuit, decided in 1944.

Finally, sir, I rely upon United States v. Rutheiser, 203 Fed. Supp. 891, which is a decision of this bench in 1962.

Thank you, your Honor.

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[fol. 556] March 14, 1963

CHARGE TO JURY

The Court: Some reference has been made to Government's Exhibit 9. Government's Exhibit 9, which has been introduced into evidence, purports to be a confession of the offense alleged in count 1 of the indictment. Two very serious questions arise for your consideration in connection with this exhibit.

The first is:

"Does this exhibit reflect a statement made and adopted [fol. 557] by the accused?"

You heard the testimony by the witnesses for the government that the exhibit was made and adopted by the defendant, and you have also heard the testimony of the defendant that he neither made nor adopted the exhibit. It is for you and you alone to weigh this evidence and determine whose testimony you believe.

Unless you believe beyond a reasonable doubt that Exhibit 9 represents a statement made by the defendant and transcribed in substance, and unless you believe beyond a reasonable doubt that the defendant acknowledged the

truth of the exhibit, then you are not to consider that it was his statement and you must not consider it in any way in your deliberations as to the guilt or innocence of the defendant in this case.

However, if you are convinced beyond a reasonable doubt that the defendant made and adopted said exhibit, you must then consider the second question.

The second question is:

"Was Exhibit 9 made by the defendant voluntarily?"

[fol. 558] The nature of any confession requires that the circumstances surrounding it be subject to careful scrutiny in order to determine whether it was voluntarily and understandingly made.

If the evidence does not convince you beyond a reasonable doubt that the purported confession was made voluntarily and understandingly, you should disregard it entirely.

If it appears to you from the evidence that Exhibit 9 would not have been made or adopted by the defendant but for some threat of harm or some offer or promise of immunity from prosecution or leniency in punishment, or other reward or benefit, then such exhibit should not be considered as having been voluntarily made.

You may also consider, on the question of voluntariness, whether the defendant was held by government agents an undue length of time prior to his having allegedly made and adopted Exhibit 9 and before having been taken before the United States Commissioner for arraignment. You may also consider the fact that the defendant did not sign Exhibit 9 in connection with this issue.

[fol. 559] In short, you must be satisfied beyond a reasonable doubt that Exhibit 9 was made and adopted by the defendant and that he did so voluntarily before you can consider it as evidence in this case. If you are not satisfied on both questions, you are to exclude consideration of Exhibit 9 from your deliberations.

Accordingly, in the light of the instructions I have given you with regard to the alleged confession, I have caused to be prepared a paper containing two questions which read as follows:

"(1) Does Exhibit 9 reflect a statement made and adopted by the accused?

"(2) Was Exhibit 9 made by the defendant voluntarily?"

I left a blank space in which one of your number may write the answer to which you all agree. The answer must be either yes or no to each question. Your determination must be unanimous as to each count, and each of you must sign the paper in the places provided at the bottom.

If your answers to either one or both of the questions are in the negative, you are to remove Exhibit 9 from any further consideration, and you must then determine whether [fol. 560] the evidence, exclusive of this exhibit, is sufficient to make a determination concerning which I have instructed you in the other portions of this charge.

What I have stated to you concerning voluntariness of Exhibit 9 would apply to any oral statement which you find beyond a reasonable doubt was made by the defendant and which amounts to a confession. That is to say, any such statement should also be excluded unless you find beyond a reasonable doubt that it was voluntary, within the meaning of that term as I have just explained it.

An admission is an incriminating statement made by a defendant but amounting to less than a full confession of all the elements of an offense with which he is charged. Many of the same considerations that apply to the voluntary characteristics of the confession apply as well to the voluntariness of an admission. That is to say, the very nature of an admission requires that the circumstances surrounding it be carefully scrutinized in order to determine whether it was voluntarily and understandingly made.

If it appears to you from the evidence in this case that [fol. 561] an admission would not have been made by this defendant but for some threat of harm, or some offer of compromise or immunity from prosecution, or leniency in punishment or other reward or benefit, then such admission must not be considered as having been voluntarily made. If the evidence does not convince you beyond a reasonable doubt that the admission was voluntarily and understand-

ingly made by the defendant, you must disregard it in its entirety.

* * * * * * *

[fol. 570] JURY RESPONSE

The Court: I have had returned to me the paper entitled "Special Jury Findings, United States v. Milton Berman," dated March 14, 1963.

The first question submitted: "Does Exhibit 9 reflect a statement made and adopted by the accused?"

The answer, written in ink, is "Yes."

Question 2: "Was Exhibit 9 made by the defendant voluntarily?"

The answer is "No."

* * * * * * *

[fol. 597] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

RENEWAL OF MOTION WITH FURTHER MOTION FOR DIRECTED VERDICT OF ACQUITTAL—Filed April 4, 1963

Defendant by Irwin L. Germaise, his attorney hereby renews his motion, heretofore made on March 6, 1963 by Order to Show Cause issued upon defendant's Petition and Motion, which motion was renewed at the trial of this action (Record, pp. 9-10) to suppress as evidence herein "any and all documents, papers and other items, seized by agents of the United States Treasury Department on or about November 2, 1962 at the ground floor showroom premises at 210 West 54th Street, City and County of New York, following a search of said premises by said agents, who did not exhibit any warrant for such search and seizure, at which premises defendant rented desk space for his office".

Said motion was made pursuant to Rule 41(e) of the Rules of Criminal Procedure, on the following grounds:

I. That no warrant had been issued authorizing said agents to search said premises nor to seize said evidence.

II. That said search and seizure were not authorized or consented to by the defendant nor by any other proper person.

[fol. 598] III. That said agents had no "probable cause" sufficing to justify them to search said premises and seize said items without a warrant.

The Court stated that it would consider the motion on the basis of evidence adduced at the trial. (See Record pages 114-115.)

The motion is addressed to the following items, offered and conditionally admitted in evidence at the trial, subject to the within Motion to suppress, to wit:

(Items Seized at 210 West 54th Street):

| Exhibit No. | Description of Documents | References in Record | |
|---|---|---|---|
| | | Trial Discussion | Received in Evidence |
| 1, 2, 3, 4 and 5 | Certain bonds, stolen from Samuel Samowitz | 13-15, 28, 128-129. | 15 |
| 6 | Bond, stolen from Elmer G. Robillard | 20, 28 | 20 |
| 7 | Plain envelope, containing inside envelope with 110 $20.00 counterfeit U. S. Currency notes. | 27-34, 72-74, 129-134, 136-138. | 30 |
| 8 | Stock Certificate | 28-29, 31, 33-34, 119-121, 131-134. | 33 |
| 10, 11 and 12 | Envelopes | 96-97. | |
| 13 | Box | 95-96 | |

In the course of trial, defendant objected (Record, page 37) to the introduction into evidence of an alleged statement made by defendant to agents Paul A. Scanlon, Harris Martin and Thomas Smith, and the said objection is hereby [fol. 599] renewed by defendant on the basis of defendant's prior motion, on the ground that the said statement was the

product of the aforesaid seizures upon the said search which defendant respectfully contends was unreasonable and violative of defendant's rights under the Fourth Amendment, to wit:

| Exhibit No. | Description | Initial Discussion | Rejected, Received |
|---|---|---|---|
| 9 | Statement | 34-36<br>36-44<br>98-99<br>139-141<br>199-201<br>203-204<br>257<br>469-472 | 41-44 (Rejected without prejudice)<br><br><br>257 (Reserved)<br>469-470<br>(Received) |

Concomitant with the renewed motion, the defendant hereby renews the motion made at trial for a Directed Verdict of Acquittal (Record, pp. 257-263), on the ground that aside from the above mentioned evidence claimed to have been obtained illegally in violation of defendant's rights under the Fourth Amendment to the Constitution, that there was insufficient evidence to support the jury's guilty verdict as to the First and Second Counts.

Defendant requests leave to submit his brief tomorrow, April 5, 1963, to which request the undersigned has the consent of the Assistant United States Attorney Fanning.

Defendant requests that the within motion be set down for Argument at such time as may be convenient to the Court.

Irwin L. Germaise, Attorney for Defendant, Office and Post Office Address, 217 Broadway, New York 7, New York.

Dated: New York, New York, April 4, 1963.

[fol. 601] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
62 Crim. 1112

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UNITED STATES OF AMERICA,

—v—

MILTON BERMAN, Defendant.

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CROAKE, District Judge

MEMORANDUM OPINION—April 22, 1963

Defendant was tried before the court and a jury for (1) possession of 110 counterfeit $20.00 United States currency bills, (2) receiving stolen United States bonds which were in interstate commerce, and (3) transporting said bonds in interstate commerce.

On the eve of trial, defendant moved to suppress evidence consisting of the counterfeit bills and stolen bonds which he claimed had been unlawfully seized by federal agents. The court reserved decision and defendant proceeded to trial. The jury returned a verdict of guilty on the first two counts, and not guilty on the third.

At the trial the Government agents testified that they had called upon the defendant at his place of work, which was [fol. 602] an automobile showroom operated and leased by Louis Okun. There the defendant operated his car-leasing business from desk space which he rented from Mr. Okun. The contraband material was found in a storeroom at the rear of the premises.

Defendant contends that the search and seizure was illegal because the agents did not have a search warrant and did not make the search pursuant to a lawful arrest or to consent. The Government argues, *inter alia*, that the search

was lawful because it was incident to the consent of the prime lessee of the premises, Mr. Okun.

All the testimony relevant to the motion to suppress was taken before me during the course of the trial, affording an opportunity to observe the witnesses and evaluate their demeanor. In addition, I have examined a transcript of the trial proceedings which was furnished to me. After carefully considering all the circumstances, I am satisfied that the search and seizure complained of was made pursuant to the consent freely given by Louis Okun, and was therefore lawful. See *United States* v. *Walker*, 190 F. 2d 481 (2d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951), *reh., denied*, 342 U.S. 899 (1951); *Calhoun* v. *United States*, 172 [fol. 603] F. 2d 457 (5th Cir. 1949), *cert. denied*, 337 U.S. 938 (1949); *Cutting* v. *United States*, 169 F. 2d 951 (9th Cir. 1948).

The motion to suppress the aforesaid evidence is, accordingly, denied, and likewise the motion made by defendant for judgment of acquittal on the grounds of the allegedly illegal search and seizure is also denied. All other motions made by defendant and reserved upon by this court are denied.

So Ordered.

Dated: New York, New York, April 22, 1963

Thomas F. Croake, U. S. D. J.

[fol. 603a]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Crim. 1112

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UNITED STATES OF AMERICA,

—v—

MILTON BERMAN, Defendant.

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TRANSCRIPT OF SENTENCING—April 24, 1963

Before:

HON. THOMAS F. CROAKE,

District Judge.

APPEARANCES:

Robert M. Morgenthau, Esq., United States Attorney, For the Government;

Charles J. Fanning, Esq., Assistant United States Attorney, of counsel.

Irwin L. Germaise, Esq., Attorney for defendant.

* * * * * * *

[fol. 604] SENTENCING BY THE COURT

I am sympathetic to your problems, but as a Judge of this Court, we have an obligation.

So it is adjudged that Milton Berman is hereby committed to the custody of the Attorney General or his authorized representative for a term of two years, and fined the sum of $1,000 on Count 1 of the indictment.

And it is adjudged that the defendant, which means you also, is committed to the custody of the Attorney General or his authorized representative for a term of two years, and fined the sum of $1,000 on Count 2 of the indictment.

It is further adjudged that the sentence as to imprisonment, imprisonment only, on Count 2, is to run concurrently with the sentence of imprisonment on Count 1.

And you are ordered to pay or stand committed until the fines herein imposed are paid or you are otherwise discharged by due course of law.

Any further application?

Mr. Germaise: Your Honor, may I request that the Court suspend the surrender date until a time in the future so that I may make application for an appeal, if it is deemed necessary?

[fol. 605] The Court: I will, yes.

Mr. Germaise: Thank you, your Honor.

The Court: May 6th.

Mr. Germaise: Thank you, sir. May I—

The Court: Yes?

Mr. Germaise: May I ask that bail be continued until such date, sir?

Mr. Fanning: No objection to the continuance of bail, your Honor. The defendant has until May 6th to surrender, I understand, and no application is being made at this time for bail pending appeal?

Mr. Germaise: Well, I will have to discuss with him whether or not he—

The Court: Well, we will fix the same amount of the bail—what is the bail now, $7,500?

Mr. Fanning: $8,500.

The Court: $8,500—we will fix $8,500 pending appeal, and if he perfects appeal at that time, you may make the proper application, and it will be decided then.

Mr. Germaise: Thank you, your Honor.

The Court: By 4:00 p. m. May 6th for surrender.

* * * * * * *

[fol. 606] Court Reporter's certificate to foregoing transcript (omitted in printing).

[fol. 607] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
No. 62 Cr. 1112

UNITED STATES OF AMERICA
v.
MILTON BERMAN

JUDGMENT AND COMMITMENT—April 24, 1963

On this 24th day of April 1963, came the attorney for the government and the defendant appeared in person and by counsel

It is adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly possessing and concealing forged and counterfeited Federal Reserve Notes, (Title 18, Section 472 U.S. Code.) unlawfully receiving, concealing, and disposing of securities valued at more than $5000., which were moving as, were part of, and constituted interstate commerce, knowing the same to have been stolen. (Title 18, Section 2315 U.S. Code.) as charged in counts 1 and 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years on each of counts 1 and 2 to run concurrently with each other.

**And**

The defendaat is Fined $1,000.00 on each of counts 1 and 2 Fines totaling $2,000.00 to be paid or the defendant is to b committed until the Fines are paid or he is otherwise dis charged according to law.

Defendant to surrender on May 6, 1963 at 4:00 P.M. to th United States Marshal for service of sentence. Preser bail continued.

Bail pending appeal fixed in the sum of $8,500.

It Is Ordered that the Clerk deliver a certified copy o this judgment and commitment to the United States Ma shal or other qualified officer and that the copy serve as th commitment of the defendant.

Thomas F. Croake, United States District Judge.

James E. Valeche, Clerk.

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[1] Insert "by counsel" or "without counsel; the court advised t defendant of his right to counsel and asked him whether he desir to have counsel appointed by the court, and the defendant the upon stated that he waived the right to the assistance of counse [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty (3) "not guilty, and a finding of guilty," or (4) "nolo contendere as the case may be. [3] Insert "in count(s) number if required. [4] Enter (1) sentence or sentences, specifying con if any; (2) whether sentences are to run concurrently or consec tively and, if consecutively, when each term is to begin with r ference to termination of preceding term or to any other outstandi unserved sentence; (3) whether defendant is to be further i prisoned until payment of the fine or fine and costs, or until he otherwise discharged as provided by law. [5] Enter any order w respect to suspension and probation. [6] For use of Court wish to recommend a particular institution.

[fol. 608] [Filed endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Cr. 1112

[Title omitted]

NOTICE OF APPEAL—Filed May 6, 1963

Offense:

Count 1.

Possession of certain counterfeit $20 Federal Reserve notes, in violation of Title 18 United States Code Section 472.

Count 2.

Receiving, concealing and storing certain securities, knowing that they were stolen, which were moving as, and were part of and constituted interstate commerce, namely: two $10,000 Series H United States Savings Bonds, three $1,000 Series H United States Savings Bonds in violation of Title 18 United States Code Section 2315.

Judgment:

Judgment of conviction and sentence thereupon were rendered April 24, 1963 upon jury verdict of guilty upon above counts, which verdict was rendered March 14, 1963.

[fol. 609] Sentence:

On April 24, 1963 defendant was sentenced to a penitentiary term of two (2) years and a fine of $1,000.00 on each count. The sentences are to run concurrently.

Commitment:

Defendant is now on bail.

I, the above-named Appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated judgment.

Dated: New York, New York, April 30, 1963.

Milton Berman, Appellant.

Irwin L. Germaise, Attorney for Appellant, Office and Post Office Address, 217 Broadway, New York 7, New York.

[fol. 610] Acknowledgment of service (omitted in printing).

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[fol. 611]

The hearing of the within motion has been set for Thursday, May 9, 1963 at 10:30 A.M. in Room 1705, U.S. Courthouse, Foley Square, New York 7, N.Y.

May 6, 1963 A. Daniel Fusaro

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In the United States Court of Appeals

For the Second Circuit

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United States of America, Appellee,

—v—

Milton Berman, Defendant-Appellant.

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Notice of Motion for Order Dismissing Appeal—May 6, 1963

Sir:

Please Take Notice that upon the annexed affidavit of Charles J. Fanning, Assistant United States Attorney, sworn to May 6, 1963, and upon all prior proceedings herein, a motion will be made by the undersigned in the United States Court of Appeals for the Second Circuit, Room 1705, United States Court House, Foley Square,

New York, New York, on the 9th day of May, 1963, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the appeal in the above-captioned case for want of jurisdiction, in that the notice of appeal was not timely filed in accordance with the provisions of Rule 37(a)(2) of the Federal Rules of Criminal Procedure.

Dated: New York, New York, May 6, 1963.

Yours, etc., Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for United States of America, Office and Post Office Address, United States Court House, Foley Square, New York 7, New York.

To: Irwin L. Germaise, Esq., 217 Broadway, New York 7, New York.

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[fol. 612]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, Appellee,

—v—

MILTON BERMAN, Defendant-Appellant,

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State of New York,
County of New York,
Southern District of New York, ss.:

AFFIDAVIT OF CHARLES J. FANNING—May 6, 1963

Charles J. Fanning, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am in charge of the above-captioned case. This affidavit is respectfully

submitted in support of the Government's motion to dismiss the captioned appeal for failure to file a timely notice of appeal.

2. On March 14, 1963, the defendant Milton Berman was found guilty after a trial before the Court and a Jury on two counts of an indictment charging him with possession of counterfeit currency and receiving stolen securities, in violation of Title 18, United States Code, Sections 472 and 2315, respectively. He was found not guilty on the third count of the indictment charging him with transporting in interstate commerce stolen securities.

[fol. 613] 3. On April 24, 1963, the defendant was sentenced to a term of 2 years imprisonment and a $2,000 fine by Judge Thomas F. Croake, United States District Judge. Judgment was filed with the District Court that same day.

4. On May 6, 1963, defendant filed a notice of appeal in the United States District Court. In accordance with the provisions of Rules 37(a)(2) and 45(b) of the Federal Rules of Criminal Procedure, which require notices of appeal to be filed within 10 days of the entry of judgment, the defendant's time to appeal expired on Saturday, May 4, 1963, on which day the District Court was open to receive, *inter alia*, notices of appeal. Accordingly, defendant has not filed a timely notice of appeal and this appeal should be dismissed.

Wherefore, it is respectfully submitted, the Government's motion to dismiss the within appeal should be granted.

Sworn to before me this 6th day of May, 1963, Virginia Donohue, Notary Public.

Charles J. Fanning, Assistant U. S. Attorney.

[fol. 614] Motion to dismiss granted.

S.R.W.
H.J.F.
J.J.S.

May 28, 1963 U.S.C.J.J.

[File endorsement omitted]

[fol. 615]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, Respondent,

v.

MILTON BERMAN, Appellant.

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State of New York,
County of New York, ss.:

AFFIDAVIT OF BERNARD B. POLAK IN OPPOSITION TO MOTION TO DISMISS APPEAL—Filed May 29, 1963

Bernard B. Polak, being duly sworn, deposes and says that he is an attorney of the State of New York, admitted to practice in this Court.

That he is associated with Irwin L. Germaise, attorney for Milton Berman, defendant-appellant herein.

That the Notice of Appeal was executed before him on May 2, 1963.

That on May 3, 1963, at 2:00 P.M., Irwin L. Germaise reasonably requested your deponent to file the Appeal that day.

That your deponent was feeling ill, and left the office to go home at 3:00 P.M. Your deponent did not pay particular attention to this matter. He placed all papers with the Secretary and asked that she see that other lawyers in the office attended to them.

That at the said time the other associates of Irwin L. Germaise were in Court or out of the office. Irwin L. Germaise was actually engaged in the trial of United States of America v. Martin Benjamin et al. in the United States District Court before Judge Palmieri.

[fol. 616] That he is informed that Irwin L. Germaise did not return to the office that day, and did not come to the office until Monday, May 6, 1963.

That your deponent was actually ill due to fatigue and had a slight temperature, and was in bed all day Saturday, May 4th and part of Sunday, May 5th.

That your deponent was not cognizant of any deviation from New York States rules, permitting matters to be filed with State Courts and State offices by a Saturday to be filed the following Monday.

Your deponent desires to advise this Court that the sentence was duly entered as a criminal judgment on April 24, 1963. However, this sentence was docketed as a civil judgment on Thursday, April 25, 1963 at 5:00 P.M. to enter the fine of $2,000.00 as a judgment lien against the defendant's property.

Wherefore, your deponent respectfully requests that the within motion be denied in all respects.

Bernard B. Polak.

Sworn to before me this 27th day of May, 1963.

Leo Cohen, Notary Public, State of New York, Qualified in Kings County, No. 24-5742400, Commission Expires March 30, 1964.

[fol. 617] [File endorsement omitted]

[fol. 618]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

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UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

MILTON BERMAN, Defendant-Appellant.

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ORDER GRANTING MOTION TO DISMISS—May 29, 1963

A motion having been made herein by counsel for the appellee to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the appeal from the United States District Court for the Southern District of New York be and it hereby is dismissed.

A. Daniel Fusaro, Clerk.

[fol. 619] [File endorsement omitted]

[fol. 620] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 621] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

32 Cr. 1112

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UNITED STATES OF AMERICA,

—v—

MILTON BERMAN, Defendant.

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NOTICE OF MOTION TO REDUCE SENTENCE—Filed May 31, 1963

Sir:

Please Take Notice, that defendant by Irwin L. Germaise his attorney will make a motion in this Court, at a motion part hereof at the Court House hereof, Foley Square, New York, New York, Room 318, on the 10th day of June, 1963 pursuant to Rule 35 of the Rules of Criminal Procedure, to reduce the sentence herein or in the alternative to grant a stay of execution so as to defer the surrender date.

Please Take Further Notice, that all papers in support of this motion will be served by Tuesday, June 4th at 4:00 P.M.

Dated: New York, New York, May 31, 1963

Yours, etc.

Irwin L. Germaise, Attorney for Defendant, Office and Post Office Address, 217 Broadway, New York 7, New York.

To: Robert M. Morgenthau, Esq., United States Attorney, United States Court House, Foley Square, New York, New York.

[fol. 622]

JUN 10 1963—Respectfully referred to Judge Croake, with his consent!

H. R. Tyler, Jr., U.S.D.J.

June 10, 1963

Motion for reduction of sentence granted to the following extent: the prison sentence on each of counts 1 and 2 is reduced to one year and 8 months to run concurrently with each other, and the fines on each of counts one and 2 are reduced to $750.00, total fine $1,500.00 to be paid or defendant to stand committed. Bail continued

So ordered.

Thomas F. Croake, U.S.D.J.

Mailed Notice 6-13-63.

Acknowledgment of service (omitted in printing).

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[fol. 623] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Crim. 1112

[Title omitted]

AMENDED NOTICE OF MOTION—Filed June 5, 1963

Sir:

Please Take Notice, that upon the annexed affidavits of Milton Berman and Irwin L. Germaise, duly sworn to the 4th day of June, 1963, such supplemental supporting affidavits as defendant may obtain, and upon all proceedings, testimony and affidavits heretofore taken herein, the defendant by Irwin L. Germaise his attorney will make a motion before the motion part of the Court, at Room 318 of the Court House thereof, Foley Square, New York, New York, on the 10th day of June, 1963 at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard,

pursuant to Rule 35 of the Rules of Criminal Procedure praying for the exercise of the Court's discretion to afford the defendant lenieney by (a) reducing the term of commitment; (b) remitting all or part of the fine imposed herein; (c) suspending execution of the term of commitment and granting probation pursuant to Section 3651 of Title 18 of the United States Code and Rule 32 of the Rules of Criminal Procedure; and (d) granting a stay of execution so as to defer the date of surrender and the commencement of execution of the sentence for a period of six (6) months from the return date of this application, and for such other and further relief as to this Court may seem just and proper.

[fol. 624] Please Take Further Notice, that the defendant respectfully requests that this motion be referred to Honorable Thomas F. Croake, the Judge who originally imposed the sentence herein.

Dated: New York, New York, June 4, 1963.

Yours, etc.,

Irwin L. Germaise, Attorney for Defendant, 217 Broadway, New York 7, New York.

To: Robert M. Morgenthau, United States Attorney, Southern District of New York, United States Court House, Foley Square, New York, New York.

[fol. 625]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Crim. No. 1112

UNITED STATES OF AMERICA,

—against—

MILTON BERMAN, Defendant.

AFFIDAVIT OF MILTON BERMAN—Filed June 5, 1963

State of New York,
County of New York, ss.:

Milton Berman, being duly sworn, deposes and says that he resides at 181 Weequahic Avenue, Newark, New Jersey, that he is the defendant herein, and that he makes this affidavit in support of an application to the Court pursuant to Rule 35 of the Rules of Criminal Procedure praying for its exercise of discretion to afford him lenieney by (a) reducing the term of commitment; (b) remitting all or part of the fine imposed herein; (c) suspending execution of the term of commitment and granting probation pursuant to Section 3651 of Title 18 of the United States Code and Rule 32 of the Rules of Criminal Procedure; and (d) granting a stay of execution so as to defer the date of surrender and the commencement of execution of the sentence for a period of six (6) months from the return date of this application.

That at the present time I have no appeal pending. My appeal from the within judgment was dismissed because it was filed one business day too late, being filed on a Monday rather than on Saturday morning when the Clerk's Office was opened.

[fol. 626] That the principal ground for this application is the fact that the execution of the sentence imposed upon the Court would not be in the best interest of the public, in that it would impose undue hardship upon various innocent creditors of your deponent by causing them to sustain a

substantial loss upon the forced sale or disposition of my assets and credits, which if effected at this time would not yield sufficient monies to satisfy even my secured debts.

That as I shall show to the Court, I have been making diligent efforts to liquidate my debts, and that since January of this year I have liquidated approximately $90,000 of a total of $512,500.00 of business debts. If permitted to continue my efforts to liquidate the assets of my business operations, during the next six (6) months with the same efforts as those up to date, I should be able to reduce this debt another $107,000. The remaining debt, of approximately $315,500.00, will be more than adequately secured by the remainder of the lease assets which will then be in a favorable position to be disposed of without a destructive loss.

That in addition, my continued availability during the next six months will enable me to avoid any substantial loss to my wife's partner, Kurt Wallach, who invested approximately $12,000 in late 1962 in a business owned jointly with my wife, namely, Eastern Auto Leasing, Inc., a Florida corporation, which was and for a short while will still be dependent upon my personal services with respect to its continuance.

That in January, 1963, Kurt Wallach additionally executed a personal note in the sum of $25,500 in favor of the Miami National Bank, the bulk of the proceeds of which [fol. 627] were paid to me and enabled me to consolidate and refinance many other loans and credits, and which were secured by titles to 15 automobiles concurrently transferred from me to said Eastern Auto Leasing, Inc. of Florida. During February, March and early April the titles to said 15 automobiles were "sold off" as the covering leases expired, and on or about April 8, 1963 said $25,500 was liquidated in full.

A similar transaction was effected by Kurt Wallach for my benefit in February, 1963, involving a re-finance loan of $77,000.00 against transfer of title to 47 automobiles from me to said Florida corporation, which titles were pledged to the Miami National Bank to secure Kurt Wallach's personal note to the bank for the loan. Some

$66,000 of this loan was used by me to liquidate a balance of the amount owed to the Franklin Discount Corporation, 1025 Broad Street, Newark, New Jersey on the 47 automobiles, and the remainder, over and above fees, taxes and prepaid interest was used to meet other commitments and expenses. The leases on 12 cars expired before the due date of May 22, 1963, and $25,000 was paid, with a renewal note of $52,000 issued on May 22nd against 35 cars. Up to June 3, 1963, leases expired on six (6) additional cars, and an additional $9,765.00 has been paid off, leaving a remainder of 29 cars subject to the loan, the balance of which has been reduced to $42,235.

During the next ninety (90) days, all of said leases will terminate normally, and the entire remainder of $42,235.00 will be repaid. My presence is needed to insure this result, since neither my wife nor Kurt Wallach have sufficient experience in the automobile field to complete these [fol. 628] transactions with a beneficial result, and the business is not large enough to afford outside help. Additionally, my availability would be helpful in obtaining some net returns on the sales of the automobiles, which would further the Corporation's present liquidation efforts.

As the result of your deponent's conviction and the dismissal of his appeal prior to the complete training and orientation of his wife and Kurt Wallach in the automobile leasing business, they have decided to dispose of or liquidate Eastern Auto Leasing, Inc. (Florida). At least $20,000.00 is presently committed by the stockholders, including at least $12,000 contributed by Kurt Wallach. The Corporation is operating 45 cars, with a secured indebtedness of about $200,000 flowing to various banks in Miami, such monetary amount now being in excess of the net realizable value if the cars have to be sold immediately. A forced sale, in breach of lease obligations, would cause a substantial loss. Kurt Wallach's capital was committed to the Corporation prior to my conviction, and the bulk of it was committed prior to my arrest. Lacking any applicable experience in the automobile business, the continuance of this business to date has depended upon my services, consultations and advice. A substantial loss of investment would occur if I would not be available during

the next six (6) months, the minimum reasonable time to locate a responsible purchaser for the entire business so as to avert such a loss.

The commitment of your deponent will additionally cause one of his creditors, Tilden Commercial Alliance, Inc., 45-14 Queens Boulevard, Jamaica, Queens, New York, to lose a substantial portion of its loans and advances to me, which on March 14, 1963, the date of the jury verdict, amounted to some $410,000.00. Of this sum, $360,000.00 [fol. 629] was secured by conditional sales agreements and lease paper on approximately 100 motor vehicles. Up to May 31, 1963, this sum has been reduced approximately $25,000 resulting from monthly rental income as well as from the sale of six (6) cars, leaving a balance of about $335,000.00. In addition, on March 14, 1963, I had $50,000 of substantially unsecured indebtedness, backed only by an equitable lien upon the assets and the business, but which indebtedness would in effect become secured by the clearing of liens had my business been able to continue operations on a normal basis.

My conviction on March 14, 1963 brought my normal business operations to a halt, and prevented me from making substantial progress since then to liquidate this latter indebtedness. From March 14, 1963 to date, I have been able to reduce this debt only $5,000.00. However, during the next six months, if permitted to continue my present method of liquidation of my various business operations, I shall be able to reduce such indebtedness by about $15,000.00, as well as reduce the secured indebtedness to Tilden by approximately $50,000.00 to a remainder of approximately $285,000.00.

Such reduction of the indebtedness to Tilden will come largely from normal earned income rather than from the sale of assets at reduced prices. The latter method of liquidation has proven feasible with the Florida indebtedness because the leases assigned to the Miami National Bank bore relatively early maturities. The aggregate majority of the leases to Tilden mature in 1964 and 1965. During the next six (6) months, the equities in the cars will not suffice to cover the indebtedness, but at that point the underlying equity and the approximate indebtedness

will be about equal. At such point, an offer of such assets [fol. 630] to a purchaser will be feasible; or some favorable arrangement for disposal of the leases will be possible with Tilden or a similar lease-finance concern. The present deficit of such net equity precludes these assets from being marketed up to that point.

The operation of a long-term auto leasing concern such as Eastern's is not a passive task of collecting rents and merely paying finance and insurance charges, but involves sustained and intricate management and administrative operations of providing service, maintenance, repairs and other ownership functions. I encounter road accidents involving significant property damage at least once or twice each month. Unless the assets of my business have some positive value, and unless there is some substantial opportunity for a person managing them to earn a living wage, it is not possible to find either a purchaser to buy them or a hired manager to supervise them.

Your deponent has made diligent efforts to find a responsible purchaser to take over Eastern's leases and operations in the New York metropolitan area, which buyer could assume or pay out the obligations owed to Tilden Commercial Alliance, Inc. The only serious prospect found was Allstate Acceptance Corp., of 123 Quimby Street, Westfield, New Jersey. During the period from March 18, 1963 to March 24, 1963, immediately following the jury verdict, I was intensely engaged in negotiations to sell in bulk the leases on 140 automobiles then operated by Eastern lessees in the New York area, at a price more than sufficient to cover all indebtedness chargeable against this operation. The final price of $508,000.00, achieved after long negotiation, would have sufficed to yield a net return to me of [fol. 631] about $22,000.00, after satisfying the said debts to Tilden of $360,000 and $50,000.00 as well as some $56,000.00 owed to the Miami National Bank on some of the cars (on which Kurt Wallach was principal obligor, as mentioned above) and some $20,000 "security" rentals prepaid by customers.

The above proposal was terminated shortly after April 1, 1963 by the prospective purchaser when its financial supporters and banks advised that they could not accept my

lease paper as collateral due to my conviction in the within action. Since then, I have endeavored to locate other prospective purchasers, but have not succeeded in finding any that could be independent of such institutions or any which could avoid similar requirements.

I have no substantial benefit to be gained by my request for deferment of the commitment date, requested as part of my prayer for relief herein. As a result of my conviction, my business can no longer continue, as I cannot obtain any new credit to write any more leasing transactions. Furthermore, I cannot make any commitments whatsoever while the sentence imposed herein is pending. All I can do now is to continue to administer leases, maintain cars on them, and to endeavor to sell them at favorable prices upon or shortly before their termination dates, so as to reduce my business and personal indebtedness and to reduce the potential loss or liability of those who have extended credit to me or who have directly or indirectly guaranteed my obligations and now are the innocent victims of my conviction. My incarceration prior to the liquidation of the leases in my New York business, or prior to the reduction of the indebtedness against them to a sum not greater than the reasonable quick sale value of the col- [fol. 632] lateral, would cause substantial suffering to my family as well as impair their relationships as well as mine to those who have extended considerable credit to me. Were I to be incarcerated while my indebtedness remained at a relatively high level, I would be subjected to judgments that I would never be able to satisfy.

The granting of the relief requested herein would avoid the greater part of such dire and bleak prospects.

Your deponent has always been considered as capable and worthy of handling large amounts of credit. It is my earnest wish to fulfill the credit obligations others have permitted me to incur. In this manner, I would hope to obviate the severe hardship to my creditors as well as my family which would punish me far more than that intended by the sentence.

I believe that I am a fit subject for the granting of lenieney while being permitted to liquidate the business mentioned hereinabove.

That I am 41 years of age, have been married since 1947 and have two (2) children, Steven, age 14 years and Andrew, age 9 years. I have always provided for their support and maintenance in accordance with my income and means.

That I completed high school and 1½ years of college (with full scholarships) prior to Army service from 1942 to 1946, from which I received an Honorable Discharge. From 1946 through 1956 I was a licensed used car dealer in the State of New Jersey. From 1957 through 1962 I operated a DeSoto-Plymouth new car agency in Manhattan, L-B Auto Sales, Inc. at 51 Lexington Avenue, New [fol. 633] York, New York. I started in automobile leasing in 1959 as a sideline, and since 1962 have been engaged in it on a full-time basis. In the course of business of my new car sales agency, I marketed Volkswagens on a wholesale basis.

That my only previous contacts with the law were various summonses for traffic violations in New Jersey and Florida, and a summons on an information in New Jersey in 1961 for selling automobiles without being registered as a dealer, to which I pleaded guilty and received a suspended sentence.

My arrest and conviction have already caused more suffering to my family as well as myself than will result from a prison commitment. The affidavits of my wife and myself, duly sworn to the 28th day of February, 1963 note the medical hardships affecting my family prior to my trial and conviction in March. These have continued unabated since that time.

Wherefore, in view of all the circumstances set forth herein, I plead most earnestly with this Court for the exercise of judicial lenieney and pray for the reduction, suspension and deferment of my sentence as mentioned hereinabove.

Milton Berman

Sworn to before me this 4th day of June, 1963.

Saul Horing, Notary Public, State of New York, No. 30-1856425, Qual. in Nassau County, Commission Expires March 30, 1965.

[fol. 634]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
62 Crim. No. 1112

---

UNITED STATES OF AMERICA,

—against—

MILTON BERMAN, Defendant.

---

AFFIDAVIT OF IRWIN L. GERMAISE—Filed June 5, 1963

State of New York,
County of New York, ss.:

Irwin L. Germaise, being duly sworn, deposes and says:

That he is the attorney for defendant, and that he makes this affidavit in support of defendant's within application for reduction, suspension or deferment of the sentence.

That this application is made at this time for a reduction of defendant's sentence. This application is also made to obtain a suspension of the sentence or a granting of probation herein, or in the alternative for a stay of execution deferring commencement of the sentence date for a period of six months.

That this application is properly before this Court inasmuch as defendant's appeal was dismissed by the Court of Appeals on or about May 29, 1963 by reason of filing of the Notice of Appeal one day late by reason of sudden illness of your deponent's associate, Bernard B. Polak, who was charged with the responsibility of filing such [fol. 635] Notice but left his office ill without notice to any other firm members. That consequently the Notice of Appeal which was prepared and scheduled to be filed on Friday, May 3, 1963 was filed on Monday, May 6, 1963. The last day for filing was Saturday, May 4, 1963.

That the embarrassment, shame and humiliation of a conviction herein have caused the defendant to sustain suffering to a greater extent than that which might be expected to result from a prison sentence.

That your deponent considers the motion as a meritorious one brought by defendant in good faith. Your deponent is aware of the family medical conditions set forth in the affidavits of defendant and his wife, sworn to the 28th day of February, 1963, the truth and currency of which have been confirmed by this office by telephone.

That the defendant has been engaged in diligent efforts to dispose of his business assets and to pay his creditors, but that defendant has been impeded from doing so by the fact of his conviction.

Your deponent is informed that if the defendant is permitted to remain at liberty under a suspension of sentence and by the granting of probation, he will be able to liquidate his business and will be able to avoid substantial loss to his various creditors as well as financial ruin to his family.

Your deponent earnestly feels that in a situation such as this, the Court in the exercise of its judicial leniency and discretion, should take cognizance of defendant's financial and family situation as set forth hereinabove.

Wherefore, deponent prays that this Court grant the relief set forth in the accompanying Notice of Motion.

Irwin L. Germaise

Sworn to before me this 4th day of June, 1963.

Saul Horing, Notary Public, State of New York, No. 30-1856425, Qual. in Nassau County, Commission Expires March 30, 1965.

[fol. 636]

JUN 10 1963

Respectfully referred to Croake, J., with his consent!

H. R. Tyler, Jr., U.S.D.J.

June 10, 1963- Motion for reduction of sentence is granted. See memo endorsed on motion for reduction of sentence filed on May 31, 1963 for details of reduction of sentence.

Thomas F. Croake, U.S.D.J.

Mailed notice 6-13-63.

Acknowledgment of service (omitted in printing).

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[fol. 637]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Cr. 1112

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UNITED STATES OF AMERICA,

vs.

MILTON BERMAN, Defendant.

---

TRANSCRIPT OF HEARING—June 10, 1963

PRESENT:

Mr. Fanning
Mr. Germaise

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COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Fanning: The Government is ready, your Honor.
Mr. Germaise: Ready, your Honor.

The Court: All right, Mr. Germaise.

Mr. Germaise: Your Honor, the defendant, Milton Berman, appreciates the time and consideration given by the Court in hearing this motion wherein we are asking for several reliefs, the first one being for a reduction in the term of commitment, the second one being a remittitur of a part or all, all or a part of the fine imposed, the third one being for the granting of probation in place of the execution of a term of commitment, and the fourth one being for the granting of a stay of execution so as to [fol. 638] further the date of surrender six months so as to allow the defendant herein an opportunity to satisfactorily put his business affairs in order and not to destroy the economy and financial stability of numerous persons.

If I may, sir, I will address myself first to the reduction in the term of commitment and the remitting of all or a part of the fine imposed herein.

Your Honor, as these supporting affidavits allege or state, the defendant herein, Mr. Milton Berman, has suffered greatly up to this point, both financially, family-wise, emotionally, business-wise and so forth.

May I say, sir, that there is another who has also suffered in this case, and that is—

The Court: I don't think it is quite necessary to go into that. You know, everybody suffers when someone has to be sent away. The innocent people are the ones who suffer, so there is no need in going into that, Mr. Germaise, because I had a telephone call, a long-distance call from Florida, which was entirely out of order. I know all about that. Every judge who sits in a courtroom is very conscious of the fact that the innocent people, the people who stay at home, the wives and children, are the ones who really [fol. 639] suffer, and we don't have to be reminded of it, and certainly, as to all the years of experience that this Court has had with this type of situation, I am very much aware of it.

However, if there is something else that you want to talk about, I will listen to you.

Please understand that this is not in the nature of an admonition or a scolding, but we don't need to be reminded of the fact that people who remain at home are the ones

who are put at a disadvantage and who suffer emotionally when a crime has been committed.

The most difficult job any man has who wears this robe is the imposition of sentence. In the month of May, I personally, sitting as the Court in Room 318, had to impose sentence on ninety-two individuals. Now, that is not an enviable task at all for anybody to have to do, but any man who is worthy of wearing this robe is very conscious of the fact, and he wouldn't be worthy of wearing this robe if he derived any pleasure from sending anyone away or imposing sentence, in any event.

However, if we can be helpful at times, that gives us some pleasure, but we know all of this, Mr. Germaise.

Mr. Germaise: There is presently no appeal pending in [fol. 640] this action, your Honor. That, sir, is the circumstance for which I take full responsibility. Herein is a measure of the guilt that I share or that my office shares.

An associate of mine, someone in my firm, was supposed to file the appeal on the necessary day. He became ill and went home. He became disturbed emotionally with the pressure of the daily routine and went home and did not again appear at the office until the following Monday, the following business day, and did not know that the Court of Appeals was open Saturday morning for the filing of a notice of appeal, which was the tenth day.

He appeared on Monday and, of course, was told that it was too late, but nonetheless it was brought up to the Court of Appeals, which denied the appeal, stating that it had no jurisdiction in the matter.

I believe, your Honor, that if the sentence were reduced a minimal amount, even to a day or two, that this would again begin the defendant's time to appeal running. This would take from the conscience of the attorney who was at fault the responsibility for denying the defendant this constitutional privilege, or this privilege under the law to [fol. 641] achieve a full measure of those rights afforded him by our judicial system.

The Court: Well, that is a consideration, of course.

* * * * * * *

[fol. 645] The Court: Let me ask you, Mr. Germaise, one thing: Is it your idea that you would promptly prosecute an appeal here if such were afforded you, if such time were afforded you? If a change were made in the sentence, would you promptly prosecute an appeal?

Mr. Germaise: Yes, your Honor. It would be the defendant's decision, and I believe that this decision would be to do so promptly, but even if he decided to do so, at least [fol. 646] it would relieve the conscience of the attorney in my firm who unfortunately became ill and thereby actually deprived the defendant of this choice when his choice was to diligently prosecute an appeal.

The Court: Mr. Fanning, that is a factor that I must take into consideration. I must take that into consideration.

Mr. Fanning: Your Honor, may I say this: I don't think there is any merit to defense counsel's claim that he has a right to appeal if the sentence is reduced in any way at all. I think he has had his one shot, and it's all over. He has no further right to appeal if the sentence is reduced.

The Court: My understanding is to the contrary, Mr. Fanning.

Mr. Fanning: This is the first time that I ever heard this point raised, and I am surprised that it is raised. I have the opinion that it is just not tenable, the contention that he can appeal if the sentence is affected in any way.

The Court: My understanding is to the contrary. However, that is not a matter that I am going to pass upon. That is a matter for the Court of Appeals to pass upon, [fol. 647] isn't it?

So, Mr. Germaise, will you have your client step forward, please.

At this time I will exercise the authority which is vested in me by Rule 35 of the Federal Rules of Criminal Procedure and will change the sentence which was heretofore imposed, so that the sentence of the Court will now be that you will be confined in the custody of the Attorney General or any of his associates or deputies for a term of one year and eight months on each count of the indictment of which

you were convicted, and those sentences are to run concurrently.

I further will reduce the fine which was imposed—if my recollection is correct—of $1,000 on each count of the indictment to $750 on each count of the indictment.

Further, I will continue you on bail until the notice of appeal is filed at which time you are instructed to make an application to the Court of Appeals for such bail as may be determined by a Judge of that part is adequate pending the prosecution and argument of that appeal.

Mr. Germaise: Thank you, your Honor.

* * * * * * *

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[fol. 648] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 62 Cr. 1142

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UNITED STATES OF AMERICA,

v.

MILTON BERMAN.

---

AMENDED JUDGMENT AND COMMITMENT—June 10, 1963

On this 10th day of June, 1963 came the attorney for the government and the defendant appeared in person and by counsel and this Court, after hearing argument and after due consideration, grants the defendant's motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure solely to the extent indicated below and amends its judgment of April 24, 1963 accordingly.

It Is Adjudged that the defendant having been convicted upon his plea of not guilty, and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly possessing and concealing forged and counterfeit Federal Reserve Notes (Title 18, Section 472, U.S. Code); unlawfully receiving, concealing and disposing of securities valued

at more than $5,000. which were moving as, were part of, and constituted interstate commerce, knowing the same to have been stolen (Title 18, Section 2315, U.S. Code), as charged[2] in Counts 1 and 2.

It having been Adjudged that the defendant was guilty as charged and convicted, the prison sentence and fines imposed on April 24, 1963 on Counts 1 and 2 are reduced, as follows:

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] One (1) Year and Eight (8) Months on each of Counts 1 and 2 to run concurrently with each other, and Fined $750. on each of Counts 1 and 2.

Fines Totalling $1,500. to be paid or the defendant is to stand committed until fines are paid or he is otherwise discharged according to law.

Bail of $8,500. fixed by Judge Lloyd F. MacMahon on June 6, 1963 is continued.

It is Ordered that the Clerk deliver a certified copy of this amended judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Thomas F. Croake, United States District Judge.

James E. Valeche, Clerk.

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

[fol. 649] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Cr. 1112

[Title omitted]

NOTICE OF APPEAL—Filed June 11, 1963

Offense:

Count 1.

Possession of certain counterfeit $20 Federal Reserve notes, in violation of Title 18 United States Code Section 472.

Count 2.

Receiving, concealing and storing certain securities, knowing that they were stolen, which were moving as, and were part of and constituted interstate commerce, namely: two $10,000 Series H United States Savings Bonds, three $1,000 Series H United States Savings Bonds, in violation of Title 18 United States Code Section 2315.

Judgment:

Judgment of conviction and sentence thereupon were rendered April 24, 1963 upon jury verdict of guilty upon above counts, which verdict was rendered March 14, 1963. [fol. 650] Defendant made timely application for reduction of sentence, pursuant to Rule 35, which application was granted. On June 10, 1963, judgment and sentence were modified.

Sentence:

On June 10, 1963 defendant was re-sentenced to a penitentiary term of one (1) year and eight (8) months and to a

fine of seven hundred fifty dollars ($750.00) on each of the aforesaid two counts; the commitments on said two counts are to be served concurrently.

Commitment:

Defendant is now on bail.

I, the above-named Appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated judgment.

Dated: New York, New York, June 11, 1963.

Milton Berman, Appellant.

Irwin L. Germaise, Attorney for Appellant, Office and Post Office Address, 217 Broadway, New York 7, New York.

[fol. 651] Acknowledgment of service (omitted in printing).

[fol. 652]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

UNITED STATES OF AMERICA, Appellee,

v.

MILTON BERMAN, Defendant-Appellant.

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NOTICE OF MOTION FOR ORDER DISMISSING APPEAL—June 12, 1963

SIR:

Please Take Notice that upon the annexed affidavit of Charles J. Fanning, Assistant United States Attorney, sworn to June 12, 1963, and upon all prior proceedings herein, a motion will be made by the undersigned in the United States Court of Appeals for the Second Circuit, Room 1705, United States Court House, Foley Square, New York, New York, on the 17th day of June, 1963, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the appeal in the above-captioned case for want of jurisdiction.

Dated: New York, New York, June 12, 1963.

Yours, etc.,

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for United States of America, Office and Post Office Address: United States Court House, Foley Square, New York 7, New York.

To: Irwin L. Germaise, Esq., 217 Broadway, New York 7, New York.

[fol. 653]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

UNITED STATES OF AMERICA, Appellee,

v.

MILTON BERMAN, Defendant-Appellant.

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State of New York,
County of New York,
Southern District of New York, ss.:

AFFIDAVIT OF CHARLES J. FANNING—June 12, 1963

Charles J. Fanning, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such am in charge of the above-captioned case. This affidavit is respectfully submitted in support of the Government's motion to dismiss the captioned appeal on the ground that the judgment of conviction sought to be reviewed has become final and is not open to review on appeal.

2. On March 14, 1963, the defendant Milton Berman was found guilty after a trial before the Court and a Jury on two counts of an indictment charging him with possession of counterfeit currency and receiving stolen securities, in violation of Title 18, United States Code, Sections 472 and 2315, respectively. He was found not guilty on the third count of the indictment charging him with transporting in interstate commerce stolen securities.

[fol. 654] 3. On April 24th, 1963, the defendant was sentenced to a term of 2 years imprisonment and a $2,000 fine by Judge Thomas F. Croake, United States District Judge. Judgment was filed with the District Court that same day.

4. On May 6, 1963, defendant filed a notice of appeal in the United States District Court.

5. Thereafter, the Government moved in the Court of Appeals to dismiss the appeal for want of jurisdiction in that the notice of appeal was not timely filed in accordance with the provisions of Rule 37(a)(2) of the Federal Rules of Criminal Procedure. On May 28, 1963, the motion to dismiss was granted.

6. On June 10, 1963, defendant moved in the District Court pursuant to Rule 35 of the Federal Rules of Criminal Procedure for reduction of sentence and on the same day that motion was granted to the extent that the term of imprisonment was reduced from two years on each count to one year and eight months on each count and from a fine of $1000 on each count to a fine of $750 on each count, the terms of imprisonment to run concurrently and the fines to constitute a total of $1500.

7. On June 11, 1963, the defendant filed the instant notice of appeal presumably on the theory that the grant of his motion pursuant to Rule 35 revived his lost right to have his conviction reviewed on direct appeal.

[fol. 655] 8. The Government contends that the grant of a motion to reduce a sentence has no effect whatever on the original judgment of conviction and does not revive the right to have that judgment of conviction reviewed once it has been, as here, irrevocably lost.

Wherefore, it is respectfully submitted that the Government's motion to dismiss the within appeal should be granted.

Charles J. Fanning, Assistant United States Attorney.

Sworn to before me this 12th day of June, 1963.

Leo Cohen, Notary Public, State of New York, Qualified in Kings County, No. 24-5712400, Commission Expires March 30, 1964.

[fol. 656] The motion to dismiss the appeal is granted.

J.E.L.
C.E.C.
P.R.H.
U.S.C.J.J.

26 June 1963

[File endorsement omitted]

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[fol. 657]

In The United States Court of Appeals

Second Circuit

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Paul R. Hays, Circuit Judges.

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United States of America, Plaintiff-Appellee,

v.

Milton Berman, Defendant-Appellant.

---

Order Granting Motion to Dismiss—June 26, 1963

A motion having been made herein by counsel for the appellee to dismiss the appeal of June 11, 1963, for lack of jurisdiction

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the appeal from the United States District Court for the Southern District of New York be and it hereby is dismissed.

A. Daniel Fusaro, Clerk by Vincent A. Carlin, Chief Deputy Clerk.

[fol. 658] [File endorsement omitted]

[fol. 659] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 660]

SUPREME COURT OF THE UNITED STATES

No. 245—October Term, 1963

---

MILTON BERMAN, Petitioner,

vs.

UNITED STATES.

---

ORDER ALLOWING CERTIORARI—October 21, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
JUN 28 1963
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**October Term, 1963**

**No. 245**

MILTON BERMAN,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FO THE SECOND CIRCUIT

## PETITION FOR CERTIORARI

IRWIN L. GERMAISE
*Attorney for Petitioner*
~~140~~ Broadway
New York ~~38~~, N. Y.

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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IN THE

# Supreme Court of the United States

**October Term, 1963**

No.

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MILTON BERMAN,

*Petitioner,*

—against—

UNITED STATES OF AMERICA

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Milton Berman, petitioner herein prays that a writ of certiorari issue to review two judgments of the United States Court of Appeals for the Second Circuit. The first judgment of the Court of Appeals was made and entered May 29, 1963, and dismissed on appeal of the petitioner filed Monday, May 6, 1963 from a judgment of conviction entered April 24, 1963 in the United States District Court for the Southern District of New York (Hon. Thomas F. Croake, Judge, sitting with a Jury). The second judgment of the Court of Appeals was made and entered June 26,

1963, and dismissed an appeal of the petitioner filed June 11, 1963 from an amended judgment made and entered on June 10, 1963 by said District Court (Hon. Thomas F. Croake, Judge; upon said conviction).

## Opinions Below

There were no opinions delivered by the Court of Appeals in granting motions to dismiss the said appeals. An opinion of the District Court denying petitioner's motions to suppress evidence is set forth in Appendix C, *infra*.

## Jurisdiction

The judgments appealed from were entered by the Court of Appeals on May 29, 1963 (Appendix A, *infra*) and on June 26, 1963 (Appendix B, *infra*). No motions for rehearings were made.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U.S.C. § 1254(1) on the ground that review by the Supreme Court of the United States by writ of certiorari is sought on two judgments of dismissal of successive appeals, entered by the United States Court of Appeals for the Second Circuit.

## Questions Presented for Review

(1) Whether it was improper for the Court of Appeals to dismiss an appeal filed on a Monday morning, the twelfth day following Wednesday afternoon sentencing and entry of judgment, where the Clerk's office was open only in the morning of the tenth day, which was a Saturday, and where

by reason thereof the appellant did not have the benefit of ten full days following the sentencing and entry of judgment for deliberation and consideration of the proposed appeal.

(2) Whether it was improper for the Court of Appeals to dismiss an appeal from the conviction filed within ten days following a resentencing and amended judgment upon the original conviction.

(3) Whether petitioner was deprived of due process of law by either the dismissal of the first appeal or by the dismissal of the second appeal in that said dismissals deprived the petitioner of any opportunity for appellate review of serious constitutional matters involved in proceedings in the trial court—to wit: the question of whether petitioner's motions in the trial court for suppression of evidence obtained by government agents sans warrant and without petitioner's free and knowledgeable consent, and for suppression of a statement found to have been given involuntarily by the petitioner, were improperly denied by the trial court. With this arises the subsidiary question whether, in light of the doctrine of *Chessman* v. *Teets*, 354 U. S. 156, that Constitutional rights are to be protected by this Court no matter how late they may be asserted,—are Constitutional rights of the petitioner to be foreclosed by reason of the filing of the first Notice of Appeal one business day after the last day for filing fixed by Rule 37 of Federal Rules of Criminal Procedure adopted by this Court.

## Constitutional Provisions, Statutes and Rules

1. Amendment V of the United States Constitution.

2. Criminal Appeals Rules Act, Act of February 24, 1933, c. 119, 47 Stat. 904, Sec. 2; as amended.

3. Rule 37(a) (2) of the Federal Rules of Criminal Procedure.

All of the foregoing are set forth in full in Appendix D annexed to this Petition.

## Statement of the Case

Petitioner Milton Berman was indicted for possession of counterfeit money and of stolen securities moving in interstate commerce, and for transporting such securities in interstate commerce (621-624). Such counterfeit money and stolen securities were found on a search without a warrant by government agents of premises where petitioner rented desk space to conduct a business. On the eve of trial, petitioner moved to suppress as evidence such contraband items on the ground that they were obtained as the result of an illegal search and seizure conducted without warrant and without his free and knowledgeable consent (651-659). Decision was reserved pending the trial; the Court stated that evidence given at the trial would be considered with respect to the motion.

On trial, petitioner renewed the motion (9-10, 114-116). The Court reserved decision on the motion until after the trial (111-116, 463-464, 590-592). Petitioner also objected to introduction into evidence of an unsigned statement purporting to be that of the defendant, petitioner herein,

marked as Exhibit 9 for identication (35-41). The Court tentatively sustained the objection (41, 44, 202). At the end of the trial, after hearing argument (458-460) the Court decided to admit it into evidence and submit said Exhibit 9 for the consideration of the Jury (460-462a, 469-472). The Court submitted questions to the Jury for Special Findings. "1. Does Exhibit 9 reflect a statement made and adopted by the accused?" and "2. Was Exhibit 9 made by the defendant voluntarily?" (557-560). The jury answered *Yes* to Question (1) and *No* to Question (2) (570-571; 665A-665B)—i.e. that the statement was the Petitioner's but that it was not given voluntarily.

By leave of Court (590-592) the motion was renewed after trial with respect to said Exhibit 9 as well as to the contraband items (699-702). The motion as renewed was denied and the Court filed its opinion with respect thereto (703-705; set forth in Appendix C, *infra*).

Petitioner was convicted on two counts, one for possession of counterfeit money in violation of 18 U.S.C. § 472, and the other for possession of stolen securities moving in interstate commerce, in violation of 18 U.S.C. § 2315 (575-595). Petitioner was sentenced on Wednesday afternoon, April 24, 1963, to a prison term of two years on each count, to be served concurrently, and to a fine of $1,000.00 on each count (597-605). Judgment was accordingly entered against petitioner on April 24, 1963 (617).

Petitioner decided to appeal, and executed the first Notice of Appeal on May 2, 1963 (A5-6). This notice was filed on May 6, 1963 (706-708); A motion to dismiss the appeal was made by the United States Attorney on May 6, 1963 on the ground that the appeal was untimely, being filed more

than ten days after the judgment (A1-3). The motion to dismiss was granted, and a judgment dismissing such appeal was made and entered on May 29, 1963 (A8; 619-620; set forth as Appendix A, *infra*).

Thereafter, petitioner moved in the District Court for review and reduction of sentence and for other relief (716-717, 718-731). On June 10, 1963, the District Court (Hon. Thomas F. Croake, Judge) pronounced a new sentence and entered an amended judgment which provided for a prison term of one year eight months on each count, to be served concurrently, and for a fine of $750.00 on each count (606-616). The said judgment of June 10, 1963 (618) was marked "Amended Judgment" and related to the initial judgment of April 24, 1963 (617). On June 11, 1963, petitioner filed a Notice of Appeal from said amended judgment (732-734). The United States Attorney moved to dismiss the latter appeal from want of jurisdiction (A4 1-4 ). Said motion was heard June 17, 1963, and was granted. On June 26, 1963, the Court of Appeals made and entered a judgment dismissing the latter appeal. (Set forth as Appendix B, *infra*).

## REASONS FOR GRANTING THE WRIT

### I. The foreclosing of petitioner's right of appeal through narrow application of Rules 37 and 45 of the Criminal Rules was not clearly prescribed by the Rules, and departs from this Court's standard of due process so as to call for exercise of its powers of supervision.

It is recognized that there are sound policy reasons for limiting the time for convicted defendants to file appeals. Such restrictions obviate many frivolous, unmeritorious appeals interposed as afterthoughts primarily to delay enforcement of judgments. *Huff* v. *United States*, 192 F. 2d 911 (5th Cir. 1952), *cert. denied* 342 U. S. 946. It is not contended that the Supreme Court lacked the power to enact Rules 37 and 45 of the Rules of Criminal Procedure, as amended, or that the Rules as they now stand must be held to constitute a denial of due process or other constitutional right. *Criminal Appeals Rules Act*, Act of February 24, 1933, c. 119, 47 Stat. 904, as amended. See *United States* v. *Robinson*, 361 U. S. 220 (1960).

It is contended that, as a necessary concomitant of the delegation of the power to make rules, that the Federal Rules of Criminal Procedure must "be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" (Rule 2). It is submitted that as a corollary, the right of appeal may not be foreclosed except by the definite and unequivocal application of simple and precise rules that clearly specify the times and circumstances when the right of appeal can be cut off. *Compare*, *Boykin* v. *Huff*, 121 F. 2d 865 (App. D. C. 1941).

The fact is in the instant case that the initial sentencing was on April 24, 1963, a Wednesday afternoon, and that the

expiration of the ten-day period, provided in Rule 37, occurred on Saturday. It so happens that the office of the Clerk of the District Court of the Southern District of New York was open on Saturday. Nothing contained in Rules 45 or 56 specify or refer to any definition of a holiday or a half holiday. There is no provision of Rules 37, 45, or 56 of the Federal Rules of Criminal Procedure that establish with any degree of clarity or certainty what days may be considered as holidays or their equivalent by the Federal Courts.

Overall federal definitions of "holiday" or "half-holiday" are not to be found in Federal statutes. Section 1 (18) of Title 11, U.S.C., defines "holiday" with reference to the Bankruptcy Act. Section 7503 of Title 26, U.S.C. gives fairly precise definitions of "legal holiday" for purposes of the Internal Revenue Code.* Title 5 U.S.C. §§ 86a, 87,

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* This section 7503 is noteworthy in that it provides for resolution of many doubtful matters not provided for in Rule 45 (a) of the Federal Rules of Criminal Procedure nor in the analagous Rule 6(a) of the Federal Rules of Civil Procedure. Title 26 U.S.C., § 7503 provides:

> § 7503. *Time for performance of acts where last day falls on Saturday, Sunday or legal holiday.*
>
> When the last day prescribed under authority of the internal revenue laws for performing any act falls on Saturday, Sunday, or a legal holiday, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday. For purposes of this section, the last day for the performance of any act shall be determined by including any authorized extension of time; the term "legal holiday" means a legal holiday in the District of Columbia; and in the case of any return, statement, or other document required to be filed, or any other act required under authority of the internal revenue laws to be performed, at any office of the Secretary or his delegate, or at any other office of the United States or any agency thereof, located outside the District of Columbia but within an internal revenue district, the term "legal holiday" also means a Statewide legal holiday in the State where such office is located.

87a and 87c provide specifications of holiday with respect to the working hours of federal employees, and provide for methods to determine the holidays for which federal employees are to be excused from work. Executive Order No. 10358, promulgated June 9, 1952, 17 F. R. 1529, implements and clarifies the mechanics of the aforesaid sections of Title 5.

A note No. 4 to said Rule 56, drafted by the Advisory Committee on Rules, appointed by this Court, indicates that "The term 'legal holiday' includes Federal holidays as well as holidays prescribed by the laws of the State where the Clerk's office is located". No authority is quoted for this. However, in the light of the history of the federal system, and of federal-state cooperation and co-ordination, it would appear appropriate to refer to New York State statutes to obtain a full definition of what constitutes the equivalent of a Sunday or holiday in the State of New York. The Court should take note of the fact that the attorney for the defendant and his office staff practice in the State of New York and have been accustomed to the operation of New York State laws and rules (A5-6).

New York statutes provide that offices of clerks of courts located in New York City, as well as all County offices, and all state offices, are closed on Saturdays, and that whenever time for filing any paper or for doing any act expires on a Saturday, such time is deemed to be extended to and including the following business day. McKinney's Consolidated Laws of New York: Book 11, County Law, §§ 206-a, 902; Book 29, Judiciary Law, § 282, Book 46, Public Officers Law, § 62. (Set forth in Appendix D, *infra*). Section 282 of the Judiciary Law is particularly relevant since this statute provides that all papers which are to be filed in Courts of

Record of Counties within New York City on a Saturday may be filed the following Monday.

In the absence of any federal pre-emption of any definition of what is a holiday or half-holiday and what is a business day, it is proper (even though unnecessary) for federal Courts to look to State law and regulations, even with regard to procedural matters. In *United States* v. *Foster*, 83 F. Supp. 197 (D. C. S.D.N.Y. 1949), the District Court for the Southern District of New York held that it was proper for the federal district court of the Southern District of New York to refer to the practice followed in New York pursuant to Section 596 of the Judiciary Law for selecting grand and petit jurors. This practice was approved by the Court of Appeals for the Second Circuit in a case that was affirmed by this Court. *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950); *affirmed*, 341 U. S. 494; *rehearing denied* 342 U. S. 842, 355 U. S. 936.

In a diverse but comparable context, this Court has recently supported States statutes that define *private* activities that are permitted and proscribed on Sundays. *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, 366 U. S. 617 (1961). Such laws were held not violative of the First Amendment nor of the Fourteenth Amendment to the Federal Constitution. Thus, in the negative sense of Bill of Rights protections as well as in areas of positive law, the determinations of State legislatures and authorities as to the welfare and interests of a large portion of the population are entitled to weight.

By enacting several statutes closing public offices in the State of New York, and particularly in the City of New York, on Saturdays, the legislature of the State of New

York has declared its policy. That such general custom of Saturday work cessation by petitioner's attorneys was involved in the instant case (A5-6) to an even greater degree than in *United States* v. *Isabella*, 251 F. 2d 223 (2d Cir. 1958), where contentions as to deprivation of the defendant-appellant's rights based upon religious observances of the defendant's attorneys were rejected, should not preclude this Court from reviewing this matter independently, in the light of all circumstances bearing upon the substantial interests of the petitioner which are at stake herein. Petitioner, by being sentenced on a Wednesday afternoon, did not have the benefit of ten full days to deliberate as to his appeal.

Petitioner is not unmindful of the Court's ruling in the *Isabella* case, *supra*, 251 F. 2d 223 (2d Cir. 1958), cited in *United States* v. *Robinson*, 361 U. S. 220, 224 (1960), which held contrariwise to petitioner's position herein, and where the factual situation is in close accord with that herein. It is submitted that in the *Isabella* case the Court of Appeals for the Second Circuit erred in not giving close considerations to the matters urged herein, particularly the lack of clarity or precision in Rules 37 and 45 of the Federal Rules of Criminal Procedure as to the need for dismissal of an appeal filed on the Monday following a Saturday expiration of the ten-day period for filing an appeal from a judgment made the Wednesday of the preceding week.

Petitioner further submits that the within action is distinguishable in that it involves substantial and fundamental appealable issues of Constitutional law regarding the effect of an exhibit admitted into evidence which the Court had found was in substance a confession, and which the Jury specially found was made involuntarily by the petitioner.

The Court did not instruct the Jury to disregard this exhibit upon the Jury's reaching of said finding. The resultant prejudice was such a plain error under the long-established line of decisions of this Court as to involuntary statements and confessions, as to call for the reversal of the petitioner's conviction. *Wilson* v. *United States*, 162 U. S. 613, 622. Furthermore, the Court's decision and order denying petitioner's successive motions to suppress evidence, on the ground that petitioner's landlord had lawful control of the area where the portion of the search was conducted which yielded the contraband, and that the landlord's consent to such search was sufficient to make it lawful, are highly doubtful in the light of this Court's decisions in *Chapman* v. *United States*, 365 U. S. 610 (1961) and in *Jones* v. *United States*, 362 U. S. 257 (1960).

In summation, it is petitioner's position that any doubts as to the application of the Federal Rules of Criminal Procedure to cut off, foreclose or limit in any way a defendant's right of appeal are to be resolved in favor of his rights of substantive and procedural due process of law as are guaranteed by the Fifth Amendment to the United States Constitution. To the extent that the *Isabella* case, *supra*, may be considered determinative, it is submitted that that decision of the Court of Appeals for the Second Circuit, which appears to have been blindly followed by said Court in the instant case, was erroneous, and that this Court should exercise its power of supervision over said Circuit Court to grant the writ of Certiorari prayed for herein.

**II. In dismissing the second appeal, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; all doubts should be resolved in favor of petitioner's rights to appeal on constitutional grounds.**

The "amended judgment" of the District Court entered June 10, 1963 (Appendix B), was a valid judgment from which the petitioner should have full right to exercise his right of appeal. The failure of the District Court to grant the petitioner's application for reduction of sentence and other relief sought by him would be reviewable upon a direct appeal timely brought. *Corcoran* v. *United States*, 231 F. 2d 449 (7th Cir. 1956). *Meyers* v. *United States*, 116 F. 2d 601 (5th Cir. 1941). It is apparent that the District Court's *grant* of such relief, and its entry of an appropriate amended judgment based upon the conviction after trial grants to the within petitioner the right to appeal therefrom within the ten-day period provided by Rule 37. *Gonzalez* v. *United States*, 233 F. 2d 825 (1st Cir. 1956) vacated, 352 U. S. 978. See also *Berman* v. *United States*, 302 U. S. 211 (1937); *compare Hixon* v. *United States*, 268 F. 2d 667 (C. A. Okla. 1959). Having exercised such right within the ten-day period following the amended judgment as limited by Rule 37, the Court of Appeals should not have dismissed the appeal. In absence of clear statutory authority clearly negating jurisdiction, the Court of Appeals should have upheld its jurisdiction so as to protect a defendant's right of appeal. Inasmuch as it has not, and by reason thereof the Petitioner's right to a fair and full hearing on appeal has been foreclosed, this Court should invoke its supervisory jurisdiction to decide this question for the first time under the Federal Rules of Criminal Procedure.

## CONCLUSION

**It is respectfully submitted that this petition for a writ of certiorari should be granted.**

Respectfully submitted,

IRWIN L. GERMAISE
*Attorney for Petitioner*
217 Broadway
New York 7, New York

Dated: New York, New York
June 28, 1963

# APPENDIX A

## Order and Judgment Dismissing First Appeal

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of May, one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
*Circuit Judges.*

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MILTON BERMAN,

Defendant-Appellant.

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A motion having been made herein by counsel for the appellee to dismiss the appeal for lack of jurisdiction.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the appeal from the United States District Court for the Southern District of New York be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

## APPENDIX B

### Order and Judgment Dismissing Second Appeal

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held in the United States Court House, in the City of New York, on the twenty-sixth day of June, one thousand nine hundred and sixty-three.

Present:

HON. J. EDWARD LUMBARD,
*Chief Judge,*
HON. CHARLES E. CLARK,
HON. PAUL R. HAYS,
*Circuit Judges.*

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MILTON BERMAN,

Defendant-Appellant.

---

A motion having been made herein by counsel for the appellee to dismiss the appeal of June 11, 1963 for lack of jurisdiction

Upon consideration thereof, it is

*Appendix B—Order and Judgment Dismissing Second Appeal*

Ordered that said motion be and it hereby is granted and that the appeal from the United States District Court for the Southern District of New York be and it hereby is dismissed.

A. Daniel Fusaro
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

# APPENDIX C

## Opinion and Order Denying Motion to Suppress

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Crim. 1112

UNITED STATES OF AMERICA,

—v.—

MILTON BERMAN,

Defendant.

CROAKE, *District Judge*

*MEMORANDUM*

Defendant was tried before the court and a jury for (1) possession of 110 counterfeit $20.00 United States currency bills, (2) receiving stolen United States bonds which were in interstate commerce, and (3) transporting said bonds in interstate commerce.

On the eve of trial, defendant moved to suppress evidence consisting of the counterfeit bills and stolen bonds which he claimed had been unlawfully seized by federal agents. The court reserved decision and defendant proceeded to trial. The jury returned a verdict of guilty on the first two counts, and not guilty on the third.

At the trial the Government agents testified that they had called upon the defendant at his place of work, which was an automobile showroom operated and leased by Louis Okum. There the defendant operated his carleasing business from desk space which he rented from Mr. Okum. The

contriband material was found in a storeroom at the rear of the premises.

Defendant contends that the search and seizure was illegal because the agents did not have a search warrant and did not make the search pursuant to a lawful arrest or to consent. The Government argues, *inter alia*, that the search was lawful because it was incident to the consent of the prime lessee of the premises, Mr. Okum.

All the testimony relevant to the motion to suppress was taken before me during the course of the trial, affording an opportunity to observe the witnesses and evaluate their demeanor. In addition, I have examined a transcript of the trial proceedings which was furnished to me. After carefully considering all the circumstances, I am satisfied that the search and seizure complained of was made pursuant to the consent freely given by Louis Okum, and was therefore lawful. See *United States* v. *Walker*, 190 F. 2d 481 (2d Cir. 1951), *cert denied*, 342 U. S. 868 (1951), *reh. denied*, 342 U. S. 899 (1951); *Calhoun* v. *United States*, 172 F. 2d, 457 (5th Cir. 1949), *cert. denied*, 337 U. S. 938 (1949); *Cutting* v. *United States*, 169 F. 2d 951 (9th Cir. 1949).

The motion to suppress the aforesaid evidence is, accordingly, denied, and likewise the motion made by defendant for judgment of acquittal on the grounds of the allegedly illegal search and seizure is also denied. All other motions made by defendant and reserved upon by this court are denied.

So Ordered.

Dated: New York, New York
April 22, 1963

Thomas F. Croake
U. S. D. J.

# APPENDIX D

## 1. Amendment V of the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## 2. Criminal Appeals Rules Act, Act of February 24, 1933, c. 119, 47 Stat. 904, Section 2, as amended:

Sec. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

## 3. Rule 37(a) (2) of the Federal Rules of Criminal Procedure provides:

(2) TIME FOR TAKING APPEAL. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial

or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

**4. Rule 45(a) of the Federal Rules of Criminal Procedure provides:**

(a) COMPUTATION. In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

**5. Rule 56 of the Federal Rules of Criminal Procedure provides:**

The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

*Appendix D*

**6. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 206-a:**

1. Notwithstanding the provisions of any general or special law, holidays and Saturdays shall be considered as Sunday for all purposes relating to the transaction of business in county offices in every county of the state, except in a county wholly contained within a city. On all other days, except Sundays, such offices shall be kept open for the transaction of business. For the purposes of this section, the term "county offices" shall mean all offices, the officers or employees of which are paid in whole or in part from county funds.

2. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended to and including the next business day.

3. Notwithstanding the foregoing provisions of this section, the motor vehicle section of a county clerk's office may, by resolution of the board of supervisors, be kept open on Saturdays during the month of January.

**7. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 902:**

1. The offices of the county clerk in the counties constituting the city of New York shall remain open for the transaction of business from nine o'clock in the forenoon to four o'clock in the afternoon every day except Saturdays, Sundays and holidays and except in the months of July and August when said offices shall remain open for the trans-

action of business from nine o'clock in the forenoon to two o'clock in the afternoon except Saturdays, Sundays and holidays.

2. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended to and including the next business day.

3. Notwithstanding the foregoing provisions of this section, the motor vehicle section of a county clerk's office may, by resolution of the board of estimate, be kept open on Saturdays during the month of January.

**8. McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, Section 282:**

1. The offices of clerks of courts of record in the counties of New York, Kings, Queens, Richmond and Bronx shall remain open for the transaction of business from nine o'clock in the forenoon to four o'clock in the afternoon everyday except Saturdays, Sundays and holidays and except in the months of July and August when said offices shall remain open for the transaction of business from nine o'clock in the forenoon to two o'clock in the afternoon except Saturdays, Sundays and holidays.

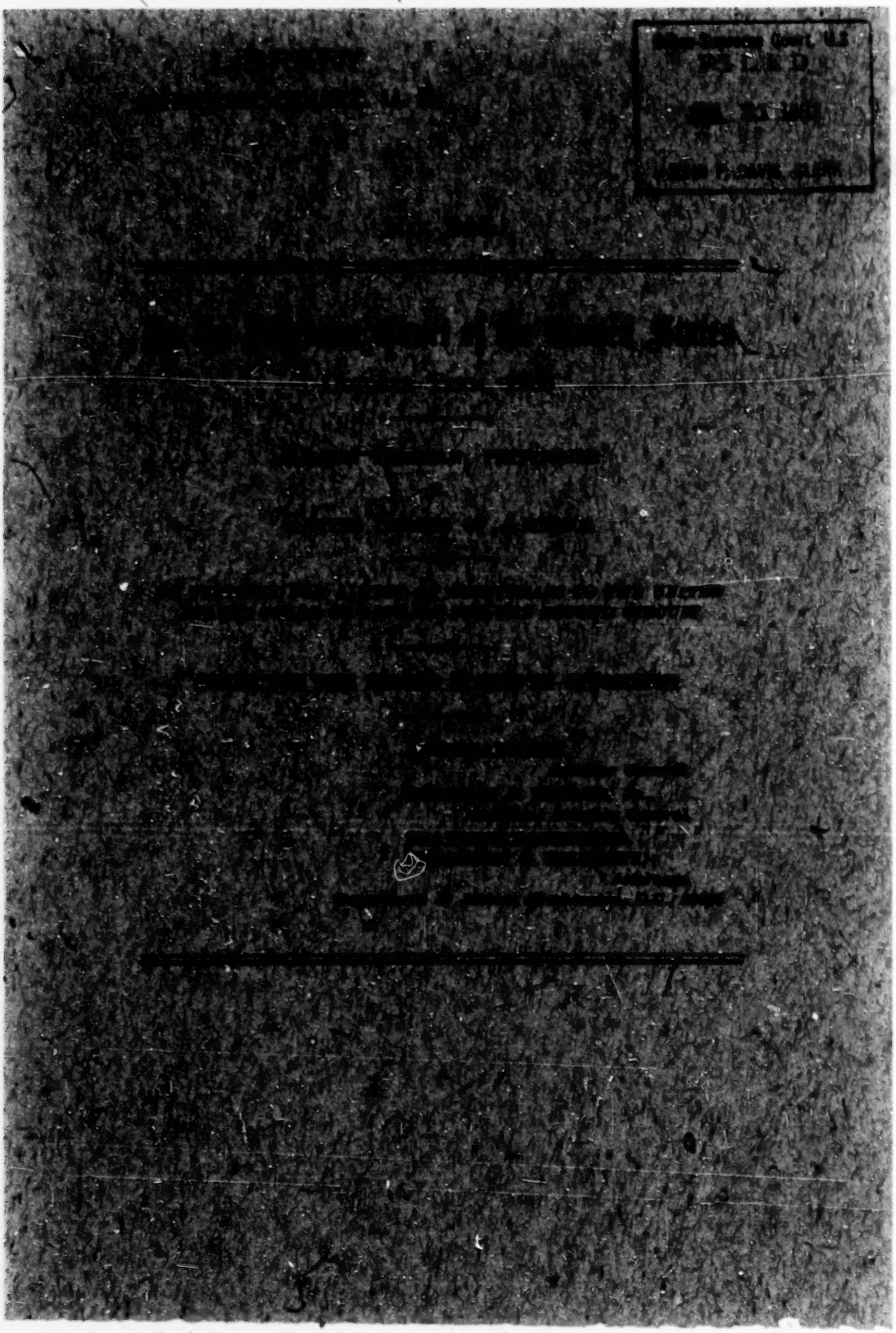
2. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended to and including the next business day.

*Appendix D*

**9. McKinney's Consolidated Laws of New York, Book 46, Public Officers' Law, Sec. 62:**

1. Holidays and half holidays shall be considered as Sunday for all purposes relating to the transaction of business in the public offices of each county. On all other days and half days, excepting Sundays, such offices shall be kept open for the transaction of business. This subdivision is subject to the provisions of section two hundred six-a of the county law and sections 1032-14.0 and 1052-22.0 of the administrative code of the city of New York.

2. Holidays and Saturdays shall be considered as Sunday for all purposes relating to the transaction of business in the public offices of the state. On all other days, excepting Sundays, such offices shall be kept open for the transaction of business. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on a Saturday, the time therefor is hereby extended to and including the next business day.



# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 245

MILTON BERMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The orders of the court of appeals (II. 8, III. 6, Pet. App. 1a–3a)[1] are not reported.

### JURISDICTION

The order of the court of appeals dismissing the first appeal was entered on May 29, 1963 (II. 4, 8). The order of the court of appeals dismissing the second appeal was entered on June 26, 1963 (III.

[1] The certified record is in three parts. The first volume consists of all papers and transcripts certified by the district court to the court of appeals and is referred to as "R". Volume II contains the proceedings in the court of appeals in the first appeal, referred to as "II". Volume III contains the proceedings in the court of appeals in the second appeal, referred to as "III".



695-875—63

6.). The petition for a writ of certiorari was filed on June 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED**

Rule 35 provides:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 37(a)(2) provides in pertinent part:

> *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion * * *.

Rule 45 provides in pertinent part:

> (a) *Computation.* In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday * * *.
>
> (b) *Enlargement.* When an act is required or allowed to be done at or within a specified

> time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

Rule 56 provides:

> The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

**QUESTIONS PRESENTED**

1. Whether, when the last day for appeal of a federal conviction falls on Saturday, the fact that state offices close on Saturday requires the exclusion of Saturday in computing the time for appeal.

2. Whether, after an appeal from a conviction has been dismissed for untimeliness, a reduction in sentence revives the opportunity for appeal.

**STATEMENT**

On March 14, 1963, petitioner was convicted by a jury in the District Court for the Southern District of New York on two counts, one charging the knowing possession of 110 counterfeited $20 bills in vio-

lation of 18 U.S.C. 472, and the other charging the knowing receipt and concealment of five Series H Bonds in the total amount of $22,000 which had been stolen and transported in interstate commerce in violation of 18 U.S.C. 2315 (R. 621–622, 586).[2]

On Wednesday, April 24, 1963, with retained counsel present, petitioner was sentenced to two years' imprisonment on each count to run concurrently and fined a total of $2,000 (R. 597–605). Judgment was entered that day (R. 617).

On Monday, May 6, 1963, petitioner filed a notice of appeal which was dated April 30, 1963 (R. 706–709). The government moved to dismiss the appeal for want of jurisdiction because the notice of appeal was not filed within 10 days as required by Rule 37(a)(2) of the Federal Rules of Criminal Procedure (II. 1–3). The 10-day period expired on Saturday, May 4. An associate of trial counsel filed an opposing affidavit, claiming that the notice of appeal had been signed on May 2, 1963, and given to him on May 3, 1963, to file, but that he became ill and gave the papers to a secretary for someone else to handle. He stated that he was ill on Saturday and Sunday, May 4 and 5, and that trial counsel did not return to the office until May 6, 1963, when the notice was filed (II. 5–6). On May 28, 1963, the court of appeals granted the government's motion to dismiss (II. 4) and on May 29, 1963, an order of dismissal was filed (II. 8–9).

[2] Petitioner was found not guilty of a third count charging him with transporting the bonds in interstate commerce.

On May 31, 1963, petitioner filed a motion in the district court for reduction of sentences under Rule 35, F.R. Crim. P. and for other relief (R. 716–732). He noted that his appeal had been dismissed because it was "filed one business day too late" (R. 720, 729–730). On June 10, 1963, at a hearing on the motion to reduce sentence, counsel stated that the notice of appeal had been late because of conditions in counsel's office and that if the sentence were reduced this would revive his client's time to appeal (R. 609–610). In answer to an inquiry of the trial judge, petitioner's counsel assured the court that an immediate appeal would be prefected if the sentence were reduced (R. 614–615). The trial judge reduced petitioner's sentence from two years' imprisonment to one year and eight months' imprisonment on each count to be served concurrently and reduced the total fine from $2,000 to $1,500 (R. 616, 717). On June 10, 1963, judgment was so entered (R. 618).

On June 11, 1963, petitioner filed a second notice of appeal (R. 732–734). On June 12, 1963, the government filed a motion to dismiss the appeal, on the ground that a reduction of sentence does not revive the right to appeal (III 1–4). On June 26, 1963, the court of appeals dismissed the appeal on the government's motion (III 5–6).

**ARGUMENT**

1. With respect to the first appeal, petitioner claims that his notice of appeal, which was filed on Monday, should not be deemed untimely, because the 10-day period to appeal expired on Saturday, a day when

the offices of the clerks of New York State courts are closed. The federal courts are, however, open on Saturday (Rule 56, F.R. Crim. P.) and Rule 45(a) of the F.R. Crim. P. provides that "[i]n computing any period of time * * * [t]he last day of the period so computed is to be included, unless it is a Sunday or legal holiday." Since Saturday has not been declared to be a legal holiday by either the United States or New York State, the appeal was not timely and it was therefore necessarily dismissed. *United States* v. *Robinson*, 361 U.S. 220; see *United States* v. *Isabella*, 251 F. 2d 223 (C.A. 2).

2. The district judge's reduction of petitioner's sentence pursuant to his motion under Rule 35, F.R. Crim. P., did not revive the right to appeal. Rule 37(a)(2) provides that an appeal must be taken within ten days "after entry of the judgment or order appealed from." Although petitioner's second appeal was taken within ten days of the order reducing his sentence, petitioner does not appeal from that order, which he requested and as to which he assigns no error. Petitioner seeks, instead, to appeal from the original judgment of conviction, and an appeal from that judgment was plainly out of time when the second notice of appeal was filed. The trial judge had no power to afford petitioner a second chance to appeal through granting his request for a reduction of sentence. *United States* v. *Robinson*, 361 U.S. 220; Rule 45(b), F.R. Crim. P.[3]

[3] The only exceptions to Rule 37's provision that an appeal must be taken within ten days of the judgment appealed from are when a motion for new trial (Rule 33) or a motion for arrest of judgment (Rule 34) is made within the

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

ARCHIBALD COX,
*Solicitor General.*
HERBERT J. MILLER, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
THEODORE G. GILINSKY,
*Attorneys.*

JULY 1963.

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ten-day period for appeal. If such a motion is denied, an appeal from the conviction may be taken within ten days after entry of the order denying the motion.

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IN THE

# Supreme Court of the United States

**October Term, 1963**

**No. 245**

MILTON BERMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PETITIONER

IRWIN L. GERMAISE,
*Attorney for Petitioner,*
217 Broadway,
New York 7, N. Y.

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IN THE

# Supreme Court of the United States

**October Term, 1963**

**No. 245**

—o—

MILTON BERMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

—o—

## BRIEF FOR THE PETITIONER

### Preliminary Statement

On October 21, 1963 this Court granted the Petitioner's Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit and placed this case on the summary calendar of the Court. The Petition prays that this Court review two orders of the United States Court of Appeals for the Second Circuit, entered May 29, 1963 and June 26, 1963, dismissing successive appeals brought by the Petitioner respectively from a sentence and judgment of conviction entered April 24, 1963, and from an amended sentence and judgment entered June 10, 1963. Neither of said orders of the Court of Appeals were accompanied by any opinion.

## Opinion Below

On the eve of trial in the United States District Court, Southern District of New York, petitioner had made a motion to suppress evidence claimed to have been unlawfully seized by federal agents, in contravention of Petitioner's rights under the Fourth Amendment (Fols. 651-659) * †. The motion was renewed during the course of the trial and again after trial (R., pp. 1, 48, 53-55; Fols. 9, 463, 597-600) *. The memorandum opinion of the trial Court, denying said motion, is included in the printed record (R., pp. 56-57). Said opinion has not yet been reported.

## Grounds for Invoking Jurisdiction of this Court

The jurisdiction of this Court is invoked under Title 28 United States Code § 1254(1) and under Rule 19 of the Rules of this Court, on the ground that this Court has the power and authority to review the said orders of the Court of Appeals, respectively made and entered May 29, 1963 and June 26, 1963. The within Petition for Certiorari was duly filed on June 28, 1963. Said jurisdiction is invoked under the general power and authority of this Court in its supervisory capacity over the actions of federal Courts in their application of the Federal Rules of Criminal Procedure, particularly Rules 37(a)(2) and 45(a).

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* References preceded by the prefix "R." refer to pages of the printed record.

References preceded by the prefix "Fol." refer to folio pages of the original record filed in this Court.

†Omitted from printed record.

## Constitutional Provisions, Statutes and Rules Involved

(Set Forth in Entirety in Appendix Hereto)

*Constitution*

1. Amendment IV, United States Constitution.

2. Amendment V, United States Constitution.

*United States Statutes*

3. Criminal Appeals Rules Act, February 24, 1933, c. 119, 47 Stat. 904, sec. 2, as Amended.

*Federal Rules of Criminal Procedure, Title 18, United States Code*

4. Rule 37(a)(2).

5. Rule 45(a).

6. Rule 56.

*New York State Statutes:*

*McKinney's Consolidated Laws of New York*

7. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 206-a.

8. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 902.

9. McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, Sec. 282.

10. McKinney's Consolidated Laws of New York, Book 46, Public Officers' Law, Sec. 62.

## Questions Presented for Review

(1) Whether it was improper for the Court of Appeals to dismiss an appeal filed on a Monday morning, the twelfth day following Wednesday afternoon sentencing and entry of judgment, where the Clerk's office was open only in the morning of the tenth day, which was a Saturday, and where by reason thereof the appellant did not have the benefit of ten full days following the sentencing and entry of judgment for deliberation and consideration of the proposed appeal.

(2) Whether it was improper for the Court of Appeals to dismiss an appeal from the conviction filed within ten days following a resentencing and amended judgment upon the original conviction.

(3) Whether petitioner was deprived of due process of law by either the dismissal of the first appeal or by the dismissal of the second appeal in that said dismissals de-dismissal of the second appeal in that said dismissals deprived the petitioner of any opportunity for appellate review of serious constitutional matters involved in proceedings in the trial court—to wit: the question of whether petitioner's motions in the trial court for suppression of evidence obtained by government agents sans warrant and without petitioner's free and knowledgeable consent, and for suppression of a statement found to have been given involuntarily by the petitioner, were improperly denied by the trial court. With this arises the subsidiary question whether, in light of the doctrine of *Chessman* v. *Teets*, 354 U. S. 156, that Constitutional rights are to be protected by this Court no matter how late they may be asserted,—are Constitutional rights of the petitioner to be foreclosed by reason of the filing of the first Notice of Appeal one business day after the last day for filing fixed by Rule 37 of Federal Rules of Criminal Procedure adopted by this Court.

## Statement of the Case

Petitioner was convicted upon trial by Court and jury, in the United States District Court, Southern District of New York for unlawful possession of counterfeit $10.00 Federal Reserve Notes, (18 U. S. C. § 472) and unlawful possession of securities in excess of $5,000.00 in interstate commerce (18 U. S. C. § 2315) respectively charged in Counts 1 and 2 of a 3-count Indictment (R. pp. 58-61).

Upon his conviction of said offenses, Petitioner was sentenced by the trial Court, and the Court made its judgment and commitment, on April 24, 1963, at 2:15 P. M. (R., pp. 58-59; Fols. 603a, 604; Orig. Record, p. 597). Petitioner decided to appeal, and executed his notice of appeal on Thursday, May 2, 1963 (R., p. 66, Fol. 615). By reason of illness of the attorney assigned to file said notice on Friday, May 3, 1963, the said Notice of Appeal was not filed until the following Monday, May 6, 1963 (R., pp. 62, 66-67; fols. 608, 615-616). The United States Attorney moved to dismiss the appeal on the ground that it was not timely filed in accordance with Rule 37(a)(2) of the Federal Rules of Criminal Procedure (R., pp. 63-65; Fols. 611-614). The said motion to dismiss was granted, and the Court of Appeals for the Second Circuit entered an order dismissing the appeal (R., pp. 65, 68; Fols. 614, 618).

Petitioner then moved in the District Court for reduction of his sentence pursuant to Rule 35 of the Rules of Criminal Procedure (R., pp. 69-71; Fols. 621-624). Petitioner's motion was heard before the Trial Judge (R., pp. 70, 81-85; Fols. 622, 636, 637-647). In the oral hearing of the motion, the trial Court noted that Petitioner intended to prosecute an appeal if the sentence was changed and an amended judgment were entered (R., pp. 83, 84, 85; Fols. 640-641, 645-647). In granting the motion and in amending the sentence and judgment, the trial Court took into account the statements of defendant's attorney that

the defendant would appeal from the amended sentence and judgment (*Ibid.*). The Court made and entered an amended judgment and commitment on June 10, 1963 (R., pp. 85-86, Fol. 648).

On June 11, 1963, Petitioner filed a Notice of Appeal from the said amended judgment and sentence (R., pp. 87-88; Fols. 649-650). The Government then moved to dismiss the appeal for want of jurisdiction (R., pp. 89-91; Fols. 652-654). The Government's motion to dismiss the appeal was granted by the Court of Appeals, which entered an Order dismissing the appeal on June 26, 1963 (R., pp. 92-93; Fols. 656-657).

Petitioner then filed his Petition for a Writ of Certiorari on June 28, 1963, which was granted by this Court on October 21, 1963 (R., p. 93; Fol. 660).

## Summary of Argument

The administration of the Rules of Criminal Procedure should be governed by considerations of simplicity in procedure and fairness in administration (Rule 2). Where one interpretation of the application of Rule 45(a), governing the computation of time, can result in avoiding a forfeiture and preclusion of the defendant's right of appeal, such interpretation should be favored. The original sentencing and judgment herein occurred in the afternoon of April 24, 1963 (Original record, p. 597 (first page of minutes of sentencing); Fol. p 603a). The tenth day following was a Saturday. It is conceded that the District Court Clerk's office, where the Notice of Appeal herein was to have been filed, was open on Saturday morning up to 12:00 noon. Inasmuch as the office was not open on Saturday afternoon, the Petitioner did not have ten full days available to him in which he could file his appeal.

In considering this matter, this Court should give due consideration to the fact that applicable New York laws

provided that all Courts and all public offices were to be closed on Saturdays. The word "holiday" as set forth in Rule 45(a) is nowhere defined in the Rules of Criminal Procedure, nor in the United States Code Titles regarding Judiciary and Judicial Procedure (Title 28) or Crimes and Criminal Procedure (Title 18). In absence of such definition, the operative status of Saturday in New York, as provided under such statutes, should be deemed the equivalent of a holiday in New York. Accordingly, the effect of such State statutes, when read into the word "holiday" in Rule 45(a), should be given effect to extend the Petitioner's time to file a Notice of Appeal from a tenth day falling on a Saturday until the following business day (a Monday in this case).

Petitioner contends that the second appeal, having been taken on June 11, 1963 from the Amended Judgment entered June 10th, was a proper appeal, and one which permitted the Court of Appeals to review the merits of the original conviction. The amended judgment was intended to stand in place of the original judgment, and it was founded upon the defendant's conviction upon his trial before Court and jury (R., pp. 85-86; Fol. 648). It is submitted that said sentence and judgment, having been against the defendant, was sufficient to give rise to defendant's right of appeal therefrom.

As indicated in the third Question presented for review herein, Petitioner seeks to protect his right to appeal to redress errors of Constitutional degree that, Petitioner contends, occurred at the trial. Petitioner contends that notwithstanding any foreclosure of any of Petitioner's rights by reason of the aforesaid Rules of Criminal Procedure, that Petitioner should still be entitled to prosecute his appeal with respect to any errors of the trial Court which were of such gravity as to abridge Petitioner's Constitutional rights. Petitioner submits that the denial of his motion to suppress evidence which federal agents

searched for and seized without warrant, and without Petitioner's consent, was an infringement of his rights, as was the admission of such evidence upon the trial.

Likewise, Petitioner claims that his Constitutional rights under the Fourth and Fifth Amendments were infringed by the admission into evidence of a statement which was elicited as the immediate and direct result of the federal agents' said alleged illegal search for and seizure of contraband. This statement was prepared by the agents while they questioned the Petitioner at their headquarters. Since the evidence of the government agents clearly indicates that Petitioner did not intend to adopt the statement as his own prior to consulting an attorney (R., pp. 9-13, 34; Fols., pp. 34-37, 38-41, 140-141), it is further submitted that such statement should have been excluded as an involuntary confession violating petitioner's Constitutional rights under the Fifth Amendment. Otherwise, the fact that a defendant expresses a desire not to sign a statement and that he declines to take a positive step by which the statement could be attributed to him, would be of little avail.

The jurisdiction of Federal appellate courts to consider the merits of Constitutional questions involved in an appeal should prevail over objections based upon the combination of various rules of Criminal Procedure in instances where their application and construction are not patently clear and certain.

## POINT I

**In absence of a clear direction in Rules 37 and 45 of the Rules of Criminal Procedure requiring dismissal of the first appeal, such rules should have been interpreted to uphold the efficacy of a notice of appeal filed the first business day following a Saturday deadline.**

Under Rule 37 of the Rules of Criminal Procedure, the ten-day period for Petitioner to file his Notice of Appeal commenced Thursday, April 25, 1963. Petitioner had been sentenced in open court on Wednesday afternoon, April 24, 1963 at 2:15 P. M. (R., pp. 58-59; Fols. 603a-606; Orig. record, p. 597); the tenth day thereafter was Saturday, May 4, 1963. Petitioner concedes that the office of the Clerk of the District Court, Southern District of New York was open on Saturdays, including May 4th, from 9:00 A. M. to 12:00 noon. The Notice of Appeal was filed on the following Monday morning, May 6, 1963. Upon the Government's motion, the Court of Appeals for the Second Circuit dismissed the appeal for want of jurisdiction (R., p. 68).

Petitioner contends that Rule 45(a) of the Rules of Criminal Procedure, defining the rules for computation of time, does not require that such last Saturday be considered as an effective deadline date. The operative provision of said Rule reads:

> "The last day of the period so computed is to be included, unless it is a Saturday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday."

Nothing contained in Rule 45(a) specifies or refers to any definition of a legal holiday, nor is there any provision of Title 18 (Crimes and Criminal Procedure) or Title 28 (Judiciary and Judicial Procedure) nor of any other appli-

cable federal statute defining what days can be considered as "legal holidays" or their equivalent within the context of Rule 45.

Some provisions of federal statutes define the meaning of the term "holiday" with respect to particular titles and chapters. Section 1(18) of Title 11, U. S. C. defines "holiday" with reference to the Bankruptcy Act. Section 7503 of Title 26, U. S. C. gives fairly precise definitions of "legal holiday" for purposes of the Internal Revenue Code. Title 5 U. S. C. §§ 86a, 87, 87a and 87c provide specifications of holiday with respect to the working hours of federal employees, and provide for methods to determine the holidays for which federal employees are to be excused from work. Executive Order No. 10358, promulgated June 9, 1952, 17 F. R. 1529, implements and clarifies the mechanics of the aforesaid sections of Title 5.

A note No. 4 to Rule 56, of the Rules of Criminal Procedure, which note was drafted by the Advisory Committee on Rules, appointed by this Court, indicates that "The term 'legal holiday' includes Federal holidays as well as holidays prescribed by the laws of the State where the Clerk's office is located". No authority is quoted for this. However, in the light of the history of the federal system, and of federal-state cooperation and co-ordination, it would appear appropriate to refer to New York State statutes to obtain a full definition of what constitutes the equivalent of a Sunday or holiday in the State of New York. The Court should take note of the fact that the attorney for the defendant and his office staff practice in the State of New York and have been accustomed to the operation of New York State laws and rules (R., pp. 66-67, 83; Fols. 615-616, 640).

New York statutes provide that offices of clerks of courts located in New York City, as well as all County offices, and all state offices, are closed on Saturdays, and that whenever time for filing any paper or for doing any act expires

on a Saturday, such time is deemed to be extended to and including the following business day. McKinney's Consolidated Laws of New York: Book 11, County Law, §§ 206-a, 902; Book 29, Judiciary Law, § 282; Book 46, Public Officers Law, § 62. (All set forth in the Appendix hereto.)

This Court should recognize that attorneys practicing in Federal Courts tend to assimilate the forms and practices in the State Courts where the Federal districts are located, to the extent that the same do not conflict with Federal practice statutes and rules. The forms and modes of State practice follow their practitioners in their cases in the United States Courts. This Court should recognize the policy voiced by the New York State Legislature, in the aforesaid Statutes (set forth in the Appendix hereto) that generally keep the Courts and public offices of the State and City of New York closed on Saturdays as the equivalent of a "legal holiday" that is specified but not defined in Rule 45.

In the absence of any federal pre-emption of any definition of what is a holiday or half-holiday and what is a business day, it is proper (even though unnecessary) for Federal Courts to look to State law and regulations. *Cf.*, *Prudential Oil & Mineral Co.* v. *Hamlin*, 261 F. 2d 626 (10th Cir. 1959).

In *United States* v. *Foster*, 83 F. Supp. 197 (D. C. S. D. N. Y. 1949), the District Court for the Southern District of New York held that it was proper for the federal district court of the Southern District of New York to refer to the practice followed in New York pursuant to Section 596 of the Judiciary Law for selecting grand and petit jurors. This practice was approved by the Court of Appeals for the Second Circuit in a case that was affirmed by this Court. *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), *affirmed*, 341 U. S. 494; *rehearing denied*, 342 U. S. 842, 355 U. S. 936.

By enacting several statutes closing public offices in the State of New York and in the City of New York on Saturdays, the legislature of the State of New York has declared its policy. That such general custom of Saturday work cessation by petitioner's attorneys was involved in the instant case as well as in *United States* v. *Isabella*, 251 F. 2d 223 (2d Cir. 1958), where contentions as to deprivation of the defendant-appellant's rights based upon religious observances of the defendant's attorneys were rejected, should not preclude this Court from reviewing this matter independently, in the light of all circumstances bearing upon the substantial interests of the petitioner which are at stake herein. Petitioner, by being sentenced on a Wednesday afternoon, did not have the benefit of ten full days to deliberate as to his appeal.

Petitioner is not unmindful of the Second Circuit Court's ruling in the *Isabella* case, *supra*, 251 F. 2d 223 (2d Cir. 1958), cited in *United States* v. *Robinson*, 361 U. S. 220, 224 (1960), which held contrariwise to petitioner's position herein. It is submitted that in the *Isabella* case the Court of Appeals for the Second Circuit erred in not giving close consideration to the matters urged herein, particularly the lack of clarity or precision in Rules 37 and 45 of the Federal Rules of Criminal Procedure as to the need for dismissal of an appeal filed on the Monday following a Saturday expiration of the ten-day period for filing an appeal from a judgment made the Wednesday of the preceding week.

To the extent that the *Isabella* case, *supra*, may be considered determinative, it is submitted that that decision, which appears to have been blindly followed by the Second Circuit Court in the instant case, was erroneous, and that this Court should exercise its power of supervision over said Circuit Court to overrule that decision.

Petitioner contends that the Federal Rules of Criminal Procedure must "be construed to secure simplicity in procedure, fairness in administration and the elimination

of unjustifiable expense and delay" (Rule 2). It is submitted that as a corollary, the right of appeal may not be foreclosed except by the definite and unequivocal application of simple and precise rules that clearly specify the times and circumstances when the right of appeal can be cut off. *Boykin* v. *Huff*, 121 F. 2d 865 (App. D. C. 1941). Petitioner submits that any doubts as to the application of the Federal Rules of Criminal Procedure to cut off, foreclosure or limit in any way a defendant's right of appeal are to be resolved in favor of his rights of substantive and procedural due process of law as are guaranteed by the Fifth Amendment to the United States Constitution.

## POINT II

**The efficacy of the notice of appeal filed Monday, May 6, 1963 is supported by the lack of a period of ten full days up to the noontime closing of the Clerk's office on Saturday, May 4, 1963.**

The right of appeal in a criminal case has substantial significance in the federal judicial system and juridical structure, so as to be worthy of protection against undue abridgement. Petitioner contends that when this Court promulgated Rule 37 of the Rules of Criminal Procedure, pursuant to the power granted to it by Congress (Criminal Appeals Rules Act, February 24, 1933, c. 119, 47 Stat. 904, as amended), it intended to give a defendant the benefit of ten full days after the date of imposition of sentence during which a defendant could effect the filing of a notice of appeal. Thus, the dismissal of his appeal filed May 6, 1963 deprived petitioner of the benefit of such period.

Petitioner contends that Rule 37 should be interpreted so as to give him ten full days following the imposition of sentence to permit him and his attorneys to deliberate as to the advisability of filing an appeal as well as to permit

the physical preparation and filing of the appeal. Inasmuch as the tenth day, May 4, 1963, was a Saturday, on which day the Clerk's office was open only until 12:00 noon, to consider such a day to be a full day for purposes of Rule 37 would abridge the opportunity that said Rule would otherwise afford to petitioner.

The ten-day period provided by Rule 37 excludes the day on which the sentence was imposed. In the within case, the court session at which petitioner was sentenced commenced at 2:15 P. M. (Original record, p. 597; Omitted from printed record; Fol. 603a). In this case, petitioner did not have the benefit of even ten full days subsequent to the pronouncement of sentence and entry of judgment, since noon on Saturday, May 4, 1963 was a fraction of a day less than ten days after the sentencing in the afternoon of April 24, 1963. Under Rule 37, a defendant is entitled to more than this—namely, ten full days subsequent to the date that the sentence is pronounced. Petitioner had only nine days and a fraction of the eight business hours of a normal work day (from 9:00 o'clock to 12:00 noon on Saturday, May 4, 1963).

It is conceded that usually, fractions of a day are not significant. However, where the ends of justice required taking such fractions into account, this Court has been willing to do so. In *Louisville* v. *Savings Bank*, 104 U. S. 469, 474-475 (1881) this Court declared that "it is true that for many purposes the law knows no division of a day; but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily into the fractions of any other unit of time. * * * The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids us, in legal proceedings, to consider its component hours, any more than about a month, which restrains us from regarding its constituent days. The

law is not made of such unreasonable and arbitrary rules." (104 U. S. at pp. 474-475).

Accordingly, this Court should find that by reason of the abridgment of the said ten-day period due to the noontime closing of the Clerk's office on Saturday, the time for filing extended to the next business day, May 6, 1963. Rules respecting the computation of time for filing a notice of appeal from a criminal conviction should not be computed mechanically with a view to cutting off a defendant's right of appeal on narrow technical grounds, but instead should be interpreted reasonably with a view to preserving such rights if there is any reasonable basis for so doing.

## POINT III

### The Court of Appeals should not have dismissed petitioner's prompt appeal from the reduced sentence and amended judgment and commitment entered June 10, 1963.

After dismissal of his appeal filed May 6, 1963, petitioner moved for reduction of his sentence and for other relief (R., pp. 69-80). At the hearing of the motion on June 10, 1963, petitioner's attorney stated that petitioner intended to prosecute an appeal from such amended judgment as might be entered were the Court to grant the motion (R., pp. 83-85; Fols. 640-641, 645-647). The trial court granted the motion, and entered an Amended Judgment and Commitment (R., pp. 84-86; Fols. 647, 648). Petitioner filed a notice of appeal therefrom, on June 11, 1963 (R., pp. 87-88; Fol. 649). Said appeal was dismissed by the Court of Appeals upon the Government's motion to dismiss for want of jurisdiction (R., pp. 89-93).

It is submitted that the Amended Judgment and Commitment entered by the District Court on June 10, 1963 (R., pp. 84-86; Fol. 648) was such a judgment as to confer upon petitioner the right of appeal therefrom.

The opportunity for a defendant to appeal from an amended or corrected judgment is indicated in *Berman* v. *United States*, 302 U. S. 211 (1957).

In *Bridges* v. *United States*, 259 F. 2d 611, 614 (9th Cir. 1958) the Court of Appeals held that the appellant in an appeal from a District Court order denying collateral relief from a sentence in a proceeding under Title 28 U. S. C. § 2255, was prejudiced by his failure to take an appeal from a "corrected judgment" entered by the court subsequent to the original judgment of conviction.

Compare *Corey* v. *United States*, United States Supreme Court Advance Opinions, No. 31, October Term 1963, 32 U. S. Law Week 4038 (December 9, 1963), wherein the defendant's right of appeal from the sentence ultimately imposed upon him was upheld by the majority, although this Court held that the defendant earlier acquired a right of appeal when subjected to the discipline of a commitment by the trial judge for observation and study pursuant to Title 18 U. S. Code § 4208(b).

It is submitted that having made timely appeal from a judgment imposed by the trial Court on June 10, 1963, with the trial Court having recognized and anticipated such appeal upon hearing and granting the motion therefor (R., pp. 84-85; Fols. 645-647), that such appeal should not have been dismissed but rather should have been considered on the merits as an appeal from the conviction herein.

## POINT IV

**Petitioner's right of appeal should be upheld to permit review of asserted errors of constitutional gravity regarding admissibility and use of contraband evidence seized upon a search without warrant, and an involuntary statement elicited as a direct result thereof.**

Regardless of any technical defect in the perfection of petitioner's successive appeals, he should be accorded the right to prosecute an appeal with respect to errors of such gravity as infringed petitioner's fundamental Constitutional rights. Petitioner is seeking to protect his right to appeal to obtain a review of errors of such degree. It is submitted that notwithstanding any minimal technical defects, an appeal should be considered on its merits to the extent that it involves infringement of Constitutional rights.

Petitioner contends that his Constitutional rights were infringed by the trial Court's rulings denying his motion to suppress contraband items seized without warrant at petitioner's place of business, and by the admission into evidence of an involuntary statement extracted from him directly following the said search and seizure (R., pp. 9, 11-12, 13, 34; see also p. 46, Fols. 36, 41, 43, 140-141; Fols. 459-460).

Petitioner had moved on the eve of trial to suppress certain stolen securities, counterfeit $10 Federal Reserve Notes, and other contraband seized by federal agents during a search of petitioner's place of business, conducted without a warrant (Original record, pp. 651-659). Petitioner urged that such search and seizure and the prospective use of the fruits thereof violated his rights under the Fourth and Fifth Amendments (*ibid.*). The motion was referred to the trial, and was renewed at the trial (R. pp. 1, 48; Fols. 9-10, 463-464). The trial Court permitted the evidence to go to the jury, and reserved decision on the motion, granting

petitioner's attorney the opportunity to serve additional papers, after trial, in support of the motion (R., pp. 48, 53-55; Fols. 463-464, 597-599).

On April 22, 1963, the trial Court issued a memorandum opinion which denied petitioner's motion to suppress evidence, and denied all reserved trial motions (R., pp. 56-57). The memorandum notes that the Government had argued, *inter alia*, "that the search was lawful because it was incident to the consent of the prime lessee of the premises" where petitioner "operated his car-leasing business from desk space which he rented from Mr. Okun" (the prime lessee). In denying the motion, the Court held "that the search and seizure complained of was made pursuant to the consent freely given by Louis Okun, and was therefore lawful" (*ibid.*).

It is manifest that the denial of petitioner's motion to suppress on such ground directly contravened the decisions of this Court in *Jones* v. *United States*, 362 U. S. 257, 263-267 (1960) and in *Chapman* v. *United States*, 365 U. S. 610, 613-618 (1961). In the *Jones* case, this Court held that a defendant had standing to move to suppress evidence claimed to have been obtained illegally in violation of Constitutional rights, regardless whether the movant claimed or conceded any property right in the contraband or any substantial property right in the premises searched. The *Chapman* case holds that consent for a search given by a landlord does not serve to foreclose the Constitutional rights of the person against whom the search is being directed or against whom the evidence has been or is to be offered. The significance of these two decisions is indicated in a statement of this Court in *Ker* v. *California*, 374 U. S. 23, 34 (1963), to the effect that States may develop workable rules governing searches and seizures, "provided that those rules do not violate the Constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible

against one who has standing to complain" (374 U. S. at p. 34). The trend of increasing protection of the individual's right to be secure against unreasonable searches and seizures is indicated by such Courts of Appeals cases as *United States* v. *Blok*, 188 F. 2d 1019 (D. C. Cir. 1951), *Foster* v. *United States*, 281 F. 2d 310 (8th Cir. 1960), and *Villano* v. *United States*, 310 F. 2d 680 (10th Cir. 1962). It is now clear that the purported consent to the federal agents' search by Louis Okun, petitioner's landlord, was ineffective to preclude the petitioner from asserting his Constitutional objections to the search. Petitioner had standing to assert his objection to the search, and having made such objection by his motion to suppress, renewed during and after the trial, was entitled to a decision and order that would not preclude his rights by reason of any consent by his landlord.

The cases cited by the trial Court in its memorandum denying the petitioner's motion to suppress (R., p. 57) are not consistent with the rulings cited herein, and furthermore, involve claims for protection by persons whose contacts with the premises in question were marginal.

The immateriality of the landlord's purported consent is demonstrated by the federal agents' patent objective of searching petitioner's property and effects. When the landlord, Louis Okun, inquired as to the reason for the agents' presence, they replied that petitioner was in trouble (R., p. 1; fol. 60). The agents were aware that certain boxes they were searching contained petitioner's papers and records, prior to their discovery of any contraband therein (R., pp. 4-5, 9, 21, 39; Fols. 27, 28-30, 35-36, 69-70, 166). The landlord also understood this; at one point, he testified that he told the agents that they could "go right ahead, as long as you don't disturb my records" (R., p. 45; fol. 430; see also R., p. 44).

Petitioner submits that the denial of his motion to suppress evidence which the agents searched for and seized

without warrant, and without petitioner's consent, was an infringement of his Constitutional rights, as was the admission of such evidence upon the trial.

Petitioner claims that his Constitutional rights under the Fourth and Fifth Amendments were infringed by the admission into evidence of a statement, Exhibit 9 (R., pp. 45-48, 49-50), which was elicited as the direct result and fruit of the federal agents' said alleged illegal search for and seizure of contraband. This statement was prepared by the agents while they questioned the Petitioner at their headquarters. Petitioner testified at the trial that he told the agents that he would not approve any statement prepared by them until he had consulted an attorney (R., pp. 9-13; Fols. 36-44).

It is manifest, that to the extent that the statement was elicited from petitioner as the direct result of the unauthorized and illegal search and seizure, that the petitioner had a concomitant right to have the statement (Exhibit 9) excluded from evidence as one variety of fruit of the poisonous tree of the illegal search and seizure. *Wong Sun* v. *United States*, 371 U. S. 471, 486 (1963). See *Worthington* v. *United States*, 166 F. 2d 557, 566 (7th Cir. 1948); *Takahashi* v. *United States*, 143 F. 2d 118 (9th Cir. 1944).

Closely related to the exclusionary rule concerning statements resulting from illegal searches and seizures is the rule excluding all admissions against interest made under coercive or inquisitorial conditions. See *Bram* v. *United States*, 168 U. S. 532, 544 (1886).

In this case, the petitioner tried to avoid being held to the content of any written statement. He explicitly advised the agents that he wanted to consult a lawyer before approving any statement written by them. Had the agents limited their use of the purported statement to refresh their recollections of what the petitioner allegedly said to them, the statement would not have been independent evi-

dence of the truth of its content. The repeated proffering of such purported statement to the petitioner, which appears in the entire thread of testimony offered, placed an element of coercion regarding the statement which, it is submitted, made it inadmissible as contravening the safeguards of the Fifth Amendment. To be sure, the jury were properly instructed to determine whether it was a voluntary statement, and that they should disregard it entirely if they found that it was involuntary (R., pp. 50-53; Fols. 556-561). Furthermore, the jury did specially find that the statement was an involuntary one (R., p. 53; Fol. 570). It is submitted that the breadth and scope of Exhibit 9 could not avoid having some influence upon the jury notwithstanding the trial court's cautionary instructions.

The evidence of the government agents clearly indicates that Petitioner did not intend to adopt the statement as his own prior to consulting an attorney (R., pp. 9-13, 34; Fol., pp. 34-37, 38-41, 140-141). Consequently, it is submitted that such statement should have been excluded as an involuntary confession violating petitioner's Constitutional rights under the Fifth Amendment. Otherwise, the fact that a defendant expresses a desire not to sign a statement and that he declines to take a positive step by which the statement could be attributed to him, would be of little avail.

## CONCLUSION

**Petitioner contends that one of the orders of the Court of Appeals for the Second Circuit, entered herein on May 29, 1963 and June 26, 1963, respectively dismissing the appeals filed by petitioner on May 6, 1963 and on June 11, 1963, was in error for the reasons set forth hereinabove; and that the same should be reversed and remanded to said Court of Appeals with instructions to reinstate such appeal for consideration on the merits.**

Respectfully submitted,

IRWIN L. GERMAISE,
*Attorney for Petitioner,*
217 Broadway,
New York 7, N. Y.

# APPENDIX

## Statutes Involved

### 1. U. S. Constitution, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### 2. U. S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### 3. Criminal Appeals Rules Act, Act of February 24, 1933, c. 119, 47 Stat. 904, Section 2. as amended:

Sec. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

**Federal Rules of Criminal Procedure:**

**4. Rule 37(a)(2):**

(2) TIME FOR TAKING APPEAL. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

**9. Rule 45(a):**

(a) COMPUTATION. In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

**10. Rule 56:**

The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a

deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

**7. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 206-a:**

1. Notwithstanding the provisions of any general or special law, holidays and Saturdays shall be considered as Sunday for all purposes relating to the transaction of business in county offices in every count of the state, except in a county wholly contained within a city. On all other days, except Sundays, such offices shall be kept open for the transaction of business. For the purposes of this section, the term "county offices" shall mean all offices, the officers or employees of which are paid in whole or in part from county funds.

2. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended to and including the next business day.

3. Notwithstanding the foregoing provisions of this section, the motor vehicle section of a county clerk's office may, by resolution of the board of supervisors, be kept open on Saturdays during the month of January.

**8. McKinney's Consolidated Laws of New York, Book 11, County Law, Sec. 902:**

1. The offices of the county clerk in the counties constituting the city of New York shall remain open for the transaction of business from nine o'clock in the forenoon to four o'clock in the afternoon every day except Saturdays, Sundays and holidays and except in the months of July and August when said offices shall remain open for the transaction of business from nine o'clock in the forenoon to two

o'clock in the afternoon except Saturdays, Sundays and holidays.

2. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended to and including the next business day.

3. Notwithstanding the foregoing provisions of this section, the motor vehicle section of a county clerk's office may, by resolution of the board of estimate, be kept open on Saturdays during the month of January.

**9. McKinney's Consolidated Laws of New York, Book 29, Judiciary Law, Section 282:**

1. The offices of clerks of courts of record in the counties of New York, Kings, Queens, Richmond and Bronx shall remain open for the transaction of business from nine o'clock in the forenoon to four o'clock in the afternoon every day except Saturdays, Sundays and holidays and except in the months of July and August when said offices shall remain open for the transaction of business from nine o'clock in the forenoon to two o'clock in the afternoon except Saturdays, Sundays and holidays.

2. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on Saturday, the time therefor is hereby extended to and including the next business day.

**10. McKinney's Consolidated Laws of New York, Book 46, Public Officers' Law, Sec. 62:**

1. Holidays and half holidays shall be considered as Sunday for all purposes relating to the transaction of business in the public offices of each county. On all other days and half days, excepting Sundays, such offices shall be kept

open for the transaction of business. This subdivision is subject to the provisions of section two hundred six-a of the county law and sections 1032-14.0 and 1052-22.0 of the administrative code of the city of New York.

2. Holidays and Saturdays shall be considered as Sunday for all purposes relating to the transaction of business in the public offices of the state. On all other days, excepting Sundays, such offices shall be kept open for the transaction of business. Whenever the last day on which any paper shall be filed or act done or performed in any such office expires on a Saturday, the ti[illegible] therefor is hereby extended to and including the next b[illegible]siness day.

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# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 245

MILTON BERMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The orders granting motions to dismiss (R. 68, 92) are not reported.

### JURISDICTION

The orders dismissing the appeals were entered on May 29, 1963 (R. 68) and June 26, 1963 (R. 92). The petition for a writ of certiorari was filed on June 28, 1963, and was granted on October 21, 1963 (R. 93; 375 U.S. 878).

## QUESTIONS PRESENTED

1. Whether, when the last day to file a notice of appeal in the United States District Court falls on Saturday, a notice filed on Monday is timely.

2. Whether the time to appeal the main conviction may be revived, after an untimely appeal is dismissed, by a reduction in sentence under Rule 35, F.R. Crim. P.

## RULES INVOLVED

Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides in pertinent part:

> *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. * * *

Rule 45(a) and (b) of the Federal Rules of Criminal Procedure provides:

> (a) *Computation.* In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or

legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) *Enlargement.* When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

Pertinent provisions of the Federal Rules of Criminal and Civil Procedure and of New York statutes relating to holidays are set forth in the Appendix, *infra*, pp. 21-24.

## STATEMENT

1. ***First Appeal:***

On March 14, 1963, petitioner was convicted by a jury in the United States District Court for the Southern District of New York on two counts of an indictment which charged him with possession of counterfeit currency, in violation of 18 U.S.C. 472, and receiving stolen securities, in violation of 18 U.S.C.

2315.[1] On April 24, 1963, petitioner was sentenced to concurrent terms of two years' imprisonment and fined $1,000 on each count, or a total fine of $2,000. Judgment was entered the same day (R. 60-61).

On May 6, 1963, petitioner filed a notice of appeal dated April 30, 1963 (R. 62-63). The government immediately moved to dismiss the appeal as untimely, noting that petitioner's "time to appeal expired on Saturday, May 4, 1963, on which day the District Court was open to receive, *inter alia*, notices of appeal" (R. 64-65). An associate of petitioner's attorney filed an affidavit stating that the notice was executed on May 2, 1963; that on May 3, 1963, counsel requested that it be filed; that deponent, feeling ill, left the notice with his secretary asking that other lawyers attend to it; that "[y]our deponent did not pay particular attention to this matter"; that he was ill Saturday, May 4, and Sunday, May 5, and was not aware that there was a difference between the federal and the New York State Rules, the latter permitting papers due on Saturday to be filed on Monday (R. 66-67). On May 29, 1963, the court of appeals granted the motion to dismiss (R. 68).

2. ***Second Appeal:***

On May 31, 1963, petitioner moved in the district court to reduce his sentence under Rule 35, F.R. Crim. P., or to stay execution thereof, and for other relief (R. 69-71). His counsel filed an affidavit assuring the

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[1] He was acquitted on a third count charging transportation of stolen securities.

court that the matter was properly before it, inasmuch as petitioner's appeal had been dismissed because the notice was filed late (R. 79).

On June 10, 1963, the district court heard argument on the motion to reduce sentence (R. 81). Counsel reiterated that no appeal was pending and that the notice had been filed late because an associate in his office "became disturbed emotionally with the pressure of the daily routine and went home" (R. 83).

Counsel then suggested that "if the sentence were reduced a minimal amount, even to a day or two, that this would again begin the defendant's time to appeal running" (R. 83). The court asked counsel if he would appeal promptly if the court afforded him the time by reducing the sentence. Counsel told the court that he believed that the petitioner would decide to appeal promptly; "at least it would relieve the conscience of the attorney in my firm who unfortunately became ill * * *" (R. 84). Government counsel stated there was no merit to the claim that there would be a right to appeal if the sentence were reduced (R. 84). The court, stating that it had a contrary understanding, reduced the jail sentence by four months and the fine by $250 on each count (R. 84-85).

On June 10, 1963, an amended judgment was filed (R. 85-86). The following day, June 11, 1963, a second notice of appeal was filed (R. 87-88). Again the government moved to dismiss (R. 89), claiming "that the grant of a motion to reduce a sentence has no effect whatever on the original judgment of conviction and does not revive the right to have the judg-

ment of conviction reviewed once it has been, as here, irrevocably lost" (R. 91). On June 26, 1963, the court of appeals granted the motion to dismiss (R. 92).

## SUMMARY OF ARGUMENT

This Court decided in *United States* v. *Robinson*, 361 U.S. 220, that the time to appeal, fixed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure, is jurisdictional and that the time cannot be enlarged even where the failure to file may be due to the excusable neglect of counsel. Those principles control this case. The fact that the attorney erroneously thought that the State practice, which excludes Saturdays from the computation, prevails in federal courts cannot serve to extend the time for appeal.

Nor could the district court revive the right to appeal from the original conviction by a reduction of sentence. Rule 45(b) prohibits any extension of the period for taking an appeal.

The question of untimely appeals is a recurring one as to which differing solutions have been suggested. The only permissible approach, we submit, is to consider the desirability or undesirability of a change in the rules. Exceptions may not be read into a rule which was designed to be absolutely firm and explicit and has the force of a statute.

## ARGUMENT

### I

**The Fact That the Last Day To File a Notice of Appeal Falls On a Saturday Does Not Extend the Time for Filing a Notice of Appeal.**

In *United States* v. *Robinson*, 361 U.S. 220, this Court held that the failure of defendant's counsel to file a timely notice of appeal from a conviction of manslaughter deprived the court of appeals of jurisdiction, even though the lack of timeliness may have been due to the excusable neglect or mistake of counsel. The Court found that the language of Rule 45 (b), which specifically states that the court may not enlarge the period for taking an appeal, is "quite plain and clear" (361 U.S. at 224); that the history of the rule showed "a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal" (361 U.S. at 228); and that the consistent judicial interpretations were to the same effect. The Court concluded (361 U.S. at 229):

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

That case controls here. In this Court, petitioner does not even argue the illness of counsel as an excuse for the failure to file the notice of appeal on the tenth day. His argument is that the tenth day fell

on a Saturday; that, under the practice in the State courts of New York, Saturdays do not count; that Saturday is also a day on which federal courts close early; and that, therefore, his notice of appeal should be deemed timely. The argument is untenable.

Rule 45(a) of the Federal Rules of Criminal Procedure, which deals with the computation of time, provides in terms that "The last day of the period so computed is to be included, unless it is a Sunday or legal holiday * * *. A half holiday shall be considered as other days and not as a holiday."[2] There is of course no basis for suggesting that Saturday is a legal holiday as a matter of federal law. Petitioner acknowledges, moreover, that the Clerk's office was open on Saturday.

To be sure, the term "legal holiday" has been construed to include holidays which are made so by State laws, even though they are not national holidays. See *Prudential Oil & Minerals Company* v. *Hamlin*, 261 F. 2d 626 (C.A. 10). Saturday is not, however, a legal holiday in the State of New York, albeit the State courts are closed. New York General Construction Law, Sec. 24 (Appendix *infra*, p. 24), identifies New York's holidays and half-holidays. Saturday is not a holiday except for banking organizations. The term "half-holiday" has been defined to include "the period from noon to midnight of each Saturday which is not a holiday." Thus, under

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[2] Although merely a printing error, petitioner's quotation of this section (Br. 9) indicates the amendment which would be necessary in order to include Saturday within the Rule. See Proposed Amendments, Federal Rules of Criminal Procedure, 31 F.R.D. 690.

New York's controlling statute Saturday cannot be treated as a full legal holiday. At most it is a half-holiday, and the federal criminal rules explicitly provide that half-holidays "shall be considered as other days" for the purpose of computing time under the rules.

Petitioner is not asking that the federal rule as to holidays be construed by reference to the New York State statute on holidays; as pointed out above, that would avail him nothing. His suggestion, rather, is that local "practice" be incorporated into the federal system. It is not apparent how far this practice of incorporation would extend, but it is evident, we submit, that the approach is one which must be rejected in its entirety.

The very purpose of the Federal Rules of Criminal Procedure (and of the civil rules as well) is to set forth a uniform system of procedure throughout the federal courts.[3] There is no provision in those rules which even remotely suggests that State procedure has any bearing upon the taking of a federal appeal. See *Federal Deposit Ins. Corporation* v. *Congregation Poiley Tzedeck*, 159 F. 2d 163, 166 (C.A. 2). No federal case has ever held that Saturday is to be excluded in computing the time for appeal in a criminal case, because State courts or other State establishments may be closed. To the contrary, see *United States* v.

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[3] Petitioner's citation to cases involving the old jury practice (Br. 11) is inapposite because the federal statute then limited jurors to those qualified by States. See 62 Stat. 951. State qualification was abolished by the Civil Rights Act of 1957, 71 Stat. 638.

*Isabella*, 251 F. 2d 223, 225 (C.A. 2); *Crow* v. *United States*, 203 F. 2d 670, 672, fn. 12 (C.A. 9); 2 Moore's *Federal Practice* (2d ed.), ¶ 6.05; *Muse* v. *Freeman*, 197 F. Supp. 67, 69-70 (E.D. Va).

Petitioner's argument that his time should extend to Monday because he did not have ten full days within which to file the notice of appeal is based upon the fact that the clerk's office was open only one-half day on Saturday[4]—his last day for filing. The answer is that Rule 37(a)(2), F. R. Crim. P., provides that an appeal be taken by filing a notice with the clerk "within 10 days after entry of the judgment." The Rule does not say within 10 *full* days and the provision for half-holidays in Rule 45(a) shows that there is no room for such a construction.

Moreover, the provision that Sundays and holidays are to be counted unless the last day to file falls on such a day shows that there was no intention to provide an attorney ten normal working days in which to appeal. Consequently, it is clear from the face of the Rule that Saturday, whether treated as a half-holiday or an 8-hour day or a 3-hour day, was to be counted—not only for appeals but for all motions under the criminal rules.

It is also apparent that petitioner's counsel made no effort to file the notice of appeal on Saturday. He thus cannot rely on the fact that the clerk's office was open only half a day. Indeed, if any real effort to

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[4] The federal courts have been authorized to close Clerk's offices since 1945. See Report of the Judicial Conference of Senior Circuit Judges, September 1945, p. 19; *Id.*, October 1946 at 26.

file had been made on Saturday, even after the office had closed, the notice of appeal would probably have been timely. See *Casalduc* v. *Diaz*, 117 F. 2d 915 (C.A. 1), certiorari denied, 314 U.S. 639; *Ward* v. *Atlantic Coast Line R. R. Co.*, 265 F. 2d 75 (C.A. 5), reversed on other grounds, 362 U.S. 396; *Hetman* v. *Fruit Growers Express Company*, 200 F. Supp. 234 (N.J.); *Johansson* v. *Towson*, 177 F. Supp. 729 (M.D. Ga.); see 7 Moore's *Federal Practice* (2d ed.), ¶¶ 77.02, 77.04, pp. 4004-4005.

The new Federal Rules of Civil Procedure provide that when the last day to file papers falls on a Saturday, Sunday or legal holiday, the time is extended to the next business day. See Rules 6(a) and 77(c), F. R. Civil P. (Appendix, *infra*, pp. 22-24). A similar change is proposed for the new Federal Rules of Criminal Procedure, 31 F.R.D. 690. As a matter of policy, that may well be a desirable change. For present purposes, however, the only relevant consideration is that existing law provides otherwise. It can neither be ignored nor interpreted away.

## II

### The Federal Rules of Criminal Procedure Prohibit The Courts From Enlarging The Period of Time For Taking An Appeal

Petitioner sought to avoid the clear impact of the prohibition against enlarging the time to take an appeal by having an "amended" judgment entered. His counsel, on June 10, 1963, requested the district court to reduce his sentence "a minimal amount, even to a day or two" so that his time for appeal would run again (R. 83). The district judge specifically

inquired whether counsel would "promptly prosecute an appeal" if the sentence were reduced (R. 84). When the governmnt stated that it did not believe such a change would give the defendant a further right to appeal, the district court stated that its understanding was to the contrary. The court, however, was in error, as appears both from the language and history of the rules and the decisions of this Court.

Rule 45(b) is clear on its face. It provides that "the court may not enlarge * * * the period for taking an appeal." The only provision which tolls the time for taking an appeal is the filing of a timely motion for a new trial or in arrest of judgment. Rule 37 (a)(2) F.R. Crim. P. Petitioner's motion for reduction of sentence, filed 37 days after judgment of conviction, does not fall within the rule. Neither the filing nor the granting of such a motion can revive the time for taking an appeal which had already been lost.

The entire history of the appellate rules confirms this conclusion. The jurisdictional nature of a timely notice of appeal is an historic characteristic of federal appellate procedure. See *United States* v. *Robinson*, 361 U.S. 220, 224, 227, and cases cited.[5] Prior to the 1934 Criminal Rules, the time to note an appeal was three months. 43 Stat. 940. By 1928, Congress had simplified criminal appeals by eliminating writs of

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[5] See, since the *Robinson* decision, *Lewis* v. *United States*, 278 F. 2d 33 (C.A.D.C.); *Wilkinson* v. *United States*, 278 F. 2d 604 (C.A. 10), certiorari denied, 363 U.S. 829; *Manson* v. *United States*, 288 F. 2d 807 (C.A. 9); *Peterkin* v. *United States*, 311 F. 2d 219 (C.A. 10), *Durel* v. *United States*, 299 F. 2d 583 (C.A. 5).

error, the petition of appeal, and the allowance of an appeal (45 Stat. 54, 466), thus making appeals a matter of right although limited by time. In the 1934 Rules, the time was reduced to 5 days because of the past inordinate delays. See 52 Harvard Law Review, pp. 983-992. These reforms, in their essentials, were continued in the present Rules of Criminal Procedure promulgated in 1946, although the time for appeal was set at 10 days. Rule 37(a)(2). In addition, the new rules further simplified appeals by eliminating assignments of error. Rule 37(a)(1), F.R. Crim. P. Cf. Rule III, 292 U.S. 662-663. In effect, almost any paper evidencing a desire for review, timely filed in the clerk's office, will suffice as a notice of appeal. See *Coppedge* v. *United States*, 369 U.S. 438, 442, fn. 5. The only suggestion ever proposed which would have authorized judges to extend the time to appeal a criminal case was a limited one contained in the preliminary draft of the appeal rule, and it was entirely eliminated by the time of the Second Preliminary Draft.[6] In sum, the history of criminal appellate procedure shows a consistent purpose to make the taking of an appeal so simple that it can readily be accomplished in a short time without the intervention of the judge. This effort to eliminate judicial discretion was reinforced in Rule 45(b) by the explicit prohibition of discretionary extensions of time for appeal. Yet petitioner's argument, if accepted, would allow

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[6] Federal Rules of Criminal Procedure, Preliminary Draft, 1943, Appeal Rule No. 35(a)(2), p. 152. Cf. Second Preliminary Draft 1944, Appeal Rule 39(a)(2), p. 135.

what the rules expressly forbid, the exercise of discretion by a district judge as to whether an appeal should be allowed and an extension of time for the taking of such appeal.[7]

In a long line of decisions, the federal courts have refused to approve attempts to gain extensions of time in violation of the clear terms of the rules. This Court, with all its powers of discretionary review, has been careful to avoid even the appearance of granting untimely petitions where counsel has returned to the lower court to obtain a "new" judgment solely to perfect a timely appeal. See *Allegrucci* v. *United States*, 372 U.S. 954. As stated in *Wayne Gas Co.* v. *Owens Co.*, 300 U.S. 131, 137:

> Where it appears that a rehearing has been granted only for that purpose [taking a late appeal] the appeal must be dismissed.

And see *Credit Co.* v. *Arkansas Central Railway*, 128 U.S. 258 (*nunc pro tunc* order); *Department of Banking* v. *Pink*, 317 U.S. 264; *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212. Cf. *United States* v. *Healy*, No. 64, this Term, decided February 17, 1964.

*A fortiori* no such power exists in the courts of appeals. *Nix* v. *United States*, 131 F. 2d 857 (C.A. 5),

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[7] The discretionary power to allow an appeal *in forma pauperis* has been criticized by members of this Court as contributing to delay. See *Coppedge* v. *United States*, 369 U.S. 438, 450, 455-458; *Hardy* v. *United States*, 375 U.S. 277, 282, concurring opinion of Justice Goldberg. There is no reason to import such delay and confusion into the rules for noting an appeal.

certiorari denied, 318 U.S. 771. One cannot, by the device of an amended judgment which adds nothing for appellate review, avoid the consequence of the initial failure to comply with prescribed procedures. Many devices have been used to attempt indirectly to extend the time for appeal (see collection of cases 89 ALR 941 and 149 ALR 740) but the courts have been alert to prevent such belated attempts to confer jurisdiction. See *e.g.*, *Rayor* v. *United States*, 323 F. 2d 519 (C.A. 9), certiorari denied, 375 U.S. 993 (untimely motion for new trial); *Wilkins* v. *United States*, 228 F. 2d 37 (C.A. D.C.) (motion for a new trial on grounds of newly discovered evidence); *Kirksey* v. *United States*, 219 F. 2d 499, 501, fn. 4 (C.A. D.C.), certiorari denied, 358 U.S. 848 (motion to vacate sentence and to correct clerical errors); *McIntosh* v. *United States*, 204 F. 2d 545 (C.A. 5) (late allowance to proceed *in forma pauperis*); *Kimbaugh* v. *United States*, 199 F. 2d 453 (C.A. 5) (motion for reduction of sentence under 28 U.S.C. 2255); *Drown* v. *United States*, 198 F. 2d 999, 1007 (C.A. 9), certiorari denied, 344 U.S. 920 (denial of permission to file late motions for a new trial and in arrest of judgment); *Marion* v. *United States*, 171 F. 2d 185, 186 (C.A. 9), certiorari denied, 337 U.S. 944 (entertaining and denying a late motion for a new trial); *United States* v. *Froehlich*, 166 F. 2d 84, 85 (C.A. 2) (denial of motion to reargue motion to set aside verdict and dismiss indictment); *Nix* v. *United States*, 131 F. 2d 857 (C.A. 5), certiorari denied, 318 U.S. 771 (attempt to appeal from revocation of probation and reduced sentence); *Dembrofsky* v.

*United States*, 86 F. 2d 677 (C.A. 1) (application to vacate and delete part of a judgment); *United States* v. *East*, 80 F. 2d 134 (C.A. 8) (government's petition in the district court for rehearing in bankruptcy case); *Fewox* v. *United States*, 77 F. 2d 699 (C.A. 5) (motion for a new trial).

In civil cases, where the rules do provide a power to extend the time in cases of excusable neglect, the Court has held that, where an untimely post-trial motion (*e.g.*, a motion for a new trial) made within the appeal period was not challenged for untimeliness, so that the appellant was not informed of the need to proceed with his appeal, a notice of appeal filed within 60 days of the denial of the motion was sufficient to confer jurisdiction. *Thompson* v. *Immigration and Naturalization Service*, 375 U.S. 384; see, also, *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215. Those cases have no application here. The criminal rules do not permit an extension of time; petitioner's motion for reduction of sentence was not made within the time to appeal from the initial judgment; and the government did give him warning that it considered the motion inadequate to extend the time for appeal.

Nor can the motion for reduction of sentence be assimilated to the situation under 18 U.S.C. 4208(b) which was before this Court in *Corey* v. *United States*, 375 U.S. 169. There, the Court held that, when a defendant is sent for diagnostic study under the statute, the time for appeal may run either from the judgment initially entered, which under the statute

is deemed to be for the maximum, or from the final sentence ultimately imposed. The Court pointed out that under Section 4208 (b) "the proceedings in the trial court are not actually terminated until after the period of diagnostic study, review of the same by the district judge, and final sentence" (375 U.S. at 175). And in *United States v. Behrens*, 375 U.S. 162, the Court itself explained the distinction between the procedure under 18 U.S.C. 4208(b) and a reduction of sentence under Rule 35, stating (p. 165):

> But a reduction of sentence under Rule 35 is quite different from the final determination under § 4208(b) of what a sentence is to be. Rule 35 refers to the power of a court to reduce a sentence which has already become final in every respect. There is no such finality of sentence at a § 4208 (b) preliminary commitment. * * *

If petitioner were attacking something which occurred in the proceeding for reduction of sentence, he could appeal from the order reducing sentence. But that is not what petitioner is seeking to do. Petitioner is seeking to use the reduction of sentence to revive a right of appeal from the conviction which, in the words of the *Behrens* decision, had "already become final in every respect." That is precisely what is forbidden under the rules.

## III

### Any Change In The Rules Must Come By Amendment of the Rules

Petitioner claims he should have an appeal because of the seriousness of the issues he seeks to raise on

review. In effect, he is arguing that, if the issues are important, he is entitled to an appeal regardless of time.[8] But, as this Court stated in another context, "Appeal rights cannot depend on the facts of a particular case," *Carroll* v. *United States*, 354 U.S. 394, 405; see, also, *Decker* v. *United States*, 97 F. 2d 473 (C.A. 5); *United States* v. *Tousey*, 101 F. 2d 892 (C.A. 7). Wherever the line is drawn, whether it be at ten days or two years, the loss of a right because of a few days difference can be made to seem arbitrary. There are, as this Court stated in *United States* v. *Robinson*, 361 U.S. at 229, "powerful policy arguments" both for and against greater flexibility in fixing the line with respect to the time for the taking of an appeal. That policy argument was, as the *Robinson* case held, deliberately resolved in favor of a strict provision by the present Rules of Criminal Procedure. If changes are to come, they must come through the rules.

As noted in the *Robinson* decision (361 U.S. at 230, fn. 14), for truly fundamental error in criminal cases the law does provide various collateral remedies

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[8] We do not agree that there was any serious error at the trial. Petitioner, by a motion to suppress, attacked the seizure of evidence found in a storeroom at the rear of an automobile showroom where petitioner merely rented desk space. The court found that the seizure was lawful since made with the consent of the prime lessee of the premises (R. 56-57). The evidence showed that petitioner had no legal interest in or control over the storeroom (R. 44-45). Petitioner's statement, which the jury under the instructions would necessarily have disregarded (R. 50-53), involved only the count on counterfeit currency.

(notably, a motion under 28 U.S.C. 2255), which are unlimited by time. See, *e.g.*, *Sanders* v. *United States*, 373 U.S. 1.[9] But as to ordinary trial errors, a defendant is bound by the action of his counsel in noting or failing to note an appeal, just as he is bound by a myriad of decisions, some of them inadvertent or mistaken, which are taken in the course of a case. *Allegrucci* v. *United States*, 372 U.S. 954; *Sunal* v. *Large*, 322 U.S. 174.

Evaluation of the problem is a matter for the Rules Committee (see *Lott* v. *United States*, 367 U.S. 421, 425; *United States* v. *Robinson*, 361 U.S. 220, 229-230) because it is only by specific change in the rules that the procedures can be coordinated. If extensions are to be granted, who should have the power to confer or withhold the jurisdiction of the court of appeals—the district court or the court of appeals? If extensions can be given, for how long, for what reason and on what terms? What type of hearing will be required to determine why the notice was late? Some suggested proposals, instead of permitting extensions, would eliminate the possibility of delay by other means. One suggestion is to have the clerk automatically file a notice in each case and require the government to move to dismiss if no steps are taken to perfect the appeal. Another is to have the district court inform all defendants, not merely unrepresented ones, of the right to appeal and the limitations of time. The place to resolve these varying points of

[9] To the extent that petitioner advances a "due process" argument, this, of course, is a complete answer.

view is in the drafting of the new Rules of Criminal Procedure. The explicit policy formulated in the present rules does not permit judicial discretion on an *ad hoc* basis.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment should be affirmed.

ARCHIBALD COX,
*Solicitor General.*

HERBERT J. MILLER, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
*Attorneys.*

MARCH 1964

## APPENDIX

1. Federal Rules of Criminal Procedure

Rule 35 provides:

*Correction or Reduction of Sentence.*

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 37(a)(1) provides:

(a) *Taking Appeal to a Court of Appeals.*

(1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the

court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

Rule 43 provides in pertinent part:

*Presence of the Defendant.*

* * * The defendant's presence is not required at a reduction of sentence under Rule 35.

Rule 56 provides:

*Courts and Clerks.* The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

2. Federal Rules of Civil Procedure.

Rule 6(a) and (b) provides:

*Time*

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall

be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Jan. 21, 1963, eff. July 1, 1963.

Rule 77(c) provides:

*District Courts and Clerks*

* * * *

(c) *Clerk's Office and Orders by Clerk.* The Clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washing-

ton's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day. * * * As amended Jan. 21, 1963, eff. July 1, 1963.

3. McKinney's Consolidated Laws of New York, Book 21, General Construction Law (1963 Pocket Part), § 24, provides:

*Holidays; half-holidays*

The term holiday includes the following days in each year: the first day of January known as New Year's day; the twelfth day of February, known as Lincoln's birthday; the twenty-second day of February, known as Washington's birthday; the thirtieth day of May, known as Memorial day; the fourth day of July, known as Independence day; the first Monday of September, known as Labor day; the twelfth day of October, known as Columbus day; the eleventh day of November, known as Veterans' day; the fourth Thursday in November, known as Thanksgiving day; and the twenty-fifth day of December, known as Christmas day, and if either of such days is Sunday, the next day thereafter; each general election day, and each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observances and Saturdays in accordance with the provisions of section twenty-four-a of this chapter. [§ 24-a. Closing of bank organizations on Saturday; emergency bank holidays]. The term half-holiday includes the period from noon to midnight of each Saturday which is not a holiday. As amended L.1955, c. 63, eff. March 10, 1955.

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IN THE

# Supreme Court of the United States

**October Term, 1963**

**No. 245**

MILTON BERMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR REHEARING

IRWIN L. GERMAISE,
*Attorney for Petitioner,*
217 Broadway,
New York 7, N. Y.

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# Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR REHEARING

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Milton Berman, petitioner herein, prays that a rehearing be granted herein upon the decision of this Court dated June 22, 1964, affirming the Judgment of the Court below. This decision was as follows:

[June 22, 1964]

"PER CURIAM.

The judgment of the Court of Appeals for the Second Circuit is affirmed. *United States* v. *Robinson*, 361 U. S. 220."

Said decision was rendered by a closely divided Court, four Justices dissenting. Petitioner can do little more than

respectfully request this Court to refer to dissenting opinion of Mr. Justice Black, in which the Chief Justice and Associate Justices Douglas and Goldberg concurred.

During the oral argument of this case, questions from the bench adverted to the dictum in *United States* v. *Robinson*, 361 U. S. 220 (1961), at page 230 note 14 that:

> "there are a number of collateral remedies available to redress denials of basic rights. Examples are: . . . the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U. S. C. § 2255; and proceedings by way of writ of error coram nobis."

In response to said questions, counsel for petitioner urged that considerations of judicial economy should prevail, to avoid the necessity of a new proceeding under 28 U. S. C. § 2255 or 28 U. S. C. § 1651(a). Counsel then had no case to cite in support of such proposition. At this time, counsel urges that this Court reconsider its decision in the light of reasoning and language in *Heflin* v. *United States*, 358 U. S. 415 (1958) at page 418, footnote 7, as follows:

> "7. Since the motion under Rule 35 is made in the original case, the time within which review by certiorari of the Court of Appeals decision should be sought is 30 days. Supreme Court Rule 22(2), 28 U. S. C. A. The petition for writ of certiorari in this case was not filed until after the passage of 30 days from the judgment below. Nevertheless, because successive motions may be made under Rule 35 and because no jurisdictional statute is involved, the majority agrees to dispense with the requirements of our Rule in order to avoid wasteful circuity." • • •

The grant of full relief to petitioner, either directly by this Court upon certiorari, or by reinstatement of the first or second appeal in the Court of Appeals below, would

"avoid wasteful circuity" as was noted by this Court in the *Heflin* case, *supra*. Resort to collateral attack also involves risks of exposure of the defendant to additional problems, including the Government's contention, by letter to this Court following argument, that collateral proceedings may not be available to petitioner to correct the Constitutional errors he could raise in a timely appeal. Petitioner does not concede validity of the Government's argument, but is concerned about this problem in view of the uncertainty of this point, particularly uncertainty of the current meaning and validity of the dictum of the *Robinson* case, *supra*, quoted hereinabove.

Petitioner has maintained that the judgment of conviction infringed petitioner's rights under the Fourth Amendment inasmuch as it made use of evidence which should have been suppressed as the product of an illegal search and seizure. The trial Court's opinion, denying the motion to suppress by reason of the consent of petitioners' landlord (reproduced in Appendix C to Petitioner's Petition for Certiorari, pp. 4a-5a), clearly was invalid in the light of *Jones* v. *United States*, 362 U. S. 257 (1960) and *Chapman* v. *United States*, 365 U. S. 610 (1961). This illegality extended to Exhibit 9, an unsigned statement which the jury specially found to be involuntary, since such statement was unquestionably the product of an illegal search and seizure. *Wong Sun* v. *United States*, 371 U. S. 471 (1963).

Since the trial jury made a special finding of fact that the said Exhibit 9 was not voluntary (R. pp. 570-571), it is submitted that the judgment of conviction was plainly invalid. The statement, Exhibit 9, as read to the jury (460-472) plainly was a confession. Having found the statement not to be voluntary, the jury could not be competent to determine the petitioner's guilt on the basis of evidence which included said Exhibit, notwithstanding limiting instructions previously given to the jury. *Spano*

v. *People of New York*, 360 U. S. 315, 321-324 (1959); *Jackson* v. *Denno*, — U. S. — (decided June 22, 1964), 73 U. S. Law Week 4620.

## CONCLUSION

**For reasons set forth above, this Court should grant a Rehearing to Petitioner, and upon Rehearing, should reverse the judgments of the Court below and remand for appropriate proceedings.**

Dated: July 17, 1964.

Respectfully submitted,

IRWIN L. GERMAISE,
*Attorney for Petitioner,*
217 Broadway,
New York 7, N. Y.

BERNARD B. POLAK,
*of Counsel.*